ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA–HQ–OAR–2023–0401; FRL–9118.1–02–OAR]

RIN 2060–AW77

Clarifying the Scope of ''Applicable Requirements'' Under State Operating Permit Programs and the Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is updating the title V operating permit program regulations to codify the Agency's existing interpretations and policies concerning when and whether ''applicable requirements'' established in other Clean Air Act (CAA) programs may be reviewed, modified, and/or implemented through the title V operating permit program. Specifically, this final rule clarifies the limited situations in which requirements under the New Source Review (NSR) preconstruction permitting program would be reviewed using the EPA's title V oversight authorities. Additionally, this final rule clarifies that requirements related to an owner or operator's general duty to prevent accidental releases of hazardous substances are not ''applicable requirements'' for title V purposes and are, therefore, not implemented through title V.

DATES: This final rule is effective on October 26, 2026.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2023–0401. All documents in the docket are listed on the *http://www.regulations.gov* website. Docket materials are available electronically through *http://www.regulations.gov*.

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SUPPLEMENTARY INFORMATION: *Preamble acronyms and abbreviations.* Throughout this preamble the use of ''we,'' ''us,'' or ''our'' is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

BACT Best Available Control Technology
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
EAB Environmental Appeals Board
E.O. Executive Order
FIP Federal Implementation Plan
FR Federal Register
GDC General Duty Clause
HAP Hazardous Air Pollutant
LAER Lowest Achievable Emissions Rate
MACT Maximum Achievable Control Technology
NAAQS National Ambient Air Quality Standards
NESHAP National Emission Standards for Hazardous Air Pollutants
NNSR Nonattainment New Source Review
NSPS New Source Performance Standards
NSR New Source Review
OSH Occupational Safety and Health
PAL Plantwide Applicability Limit
PSD Prevention of Significant Deterioration
RTC Response to Comments
SIP State Implementation Plan
SSM Startup, Shutdown, and Malfunction
U.S.C. United States Code

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I. General Information and Executive Summary

Title V of the Clean Air Act requires the establishment of a permitting program for covered stationary sources that incorporates various stationary source limitations set out elsewhere in the statute. Covered sources generally may not operate without a title V permit, and title V permits must ''include enforceable emissions limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.'' [1] The EPA maintains regulations that address the relationship between title V and other CAA programs and define the term ''applicable requirements,'' which the statute itself does not further define.[2]

On January 9, 2024, the EPA published a proposed rule addressing the relationship between the CAA's title V operating permit program and certain types of ''applicable requirements'' established under different sections of the CAA (the ''January 2024 Proposed Rule'').[3] The January 2024 Proposed Rule was designed to update the EPA's regulations to better express the EPA's existing approaches to topics that have been the source of public interest and, at times, misunderstanding. The preamble discussion and regulatory changes accompanying this final rule are similarly intended to provide clarity

[1] 42 U.S.C. 7661c(a). ''[A]pplicable implementation plan'' refers to the relevant EPA-approved State implementation plan (SIP) or Federal implementation plan (FIP), which may include more granular requirements applicable to the source based on its location.

[2] 40 CFR 70.2 and 71.2.

[3] Clarifying the Scope of ''Applicable Requirements'' Under State Operating Permit Programs and the Federal Operating Permit Program, 89 FR 1190 (January 9, 2024).

about the EPA's approaches. The EPA received public comment on many of the topics discussed in the January 2024 Proposed Rule. The EPA's responses to the most significant comments are included within this preamble, which is organized similarly to the January 2024 Proposed Rule preamble. A complete response to comments (RTC) document is included in the docket for this final rule.

This preamble addresses three substantive topics. Section II of this preamble includes background on the EPA's longstanding position regarding a number of general topics involving ''applicable requirements.'' This discussion is similar to the background discussion in the January 2024 Proposed Rule and has been updated in response to public comments. In summary, the title V operating permit program is a vehicle for compiling air quality control requirements from other CAA programs and provides conditions necessary to assure compliance with such requirements, but it is not a vehicle for creating or changing applicable requirements from those other programs. The EPA has a regulatory definition of the term ''applicable requirement'' that guides the interaction between title V and other CAA programs.[4] Some programs establish ''self-implementing'' requirements that can be incorporated into title V permits without further review. Other programs contain only general requirements that can, in certain circumstances, be further defined through title V permits. This section concludes by summarizing the EPA's positions on how these concepts affect requirements related to the National Ambient Air Quality Standards (NAAQS) and State Implementation Plans (SIPs).

Section III of this preamble addresses the intersection between title V operating permits and NSR preconstruction permits issued under title I of the CAA; in short, the EPA's title V oversight authorities generally may not be used to review NSR requirements. Section III.A of this preamble discusses the EPA's historical and current approaches to the intersection between permits issued under title I and title V. Although the existing regulations may be properly read to support the EPA's existing approach, the regulatory amendments finalized in this action make this approach more explicit. Updating the EPA's regulations allows the Agency to apply our approach nationwide and resolves issues stemming from conflicting court decisions from the U.S. Court of Appeals for the Tenth Circuit and the Fifth Circuit.

Section III.B of this preamble summarizes the regulatory amendments finalized in this action to reflect the approach the EPA has taken since 2017. In summary, provided a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I regulations, with public notice and the opportunity for comment and judicial review, that NSR permit establishes the NSR-related ''applicable requirements'' of the SIP (or Federal Implementation Plan (FIP)) for purposes of incorporation into a title V permit. As with ''applicable requirements'' established under other CAA authorities, the EPA will not reevaluate those NSR permitting decisions through the title V process.

Section III.C of this preamble details the EPA's legal and policy rationale for the Agency's approach, which reflects the best reading of the relevant statutory provisions. The EPA's interpretation is supported by the text, structure, and purpose of title V and the structure of the CAA as a whole. It also best effectuates the intent of Congress. This rule ensures that applicable requirements established in different CAA programs are treated consistently in title V permitting, accounts for the limitations associated with title V oversight tools, emphasizes title I avenues of review, and respects the finality of, and fosters certainty in, title I permitting decisions.

Section III.D of this preamble details how the updated regulatory provisions in this final rule apply in different circumstances. In general, the EPA will not use the title V process to address NSR issues, regardless of: (i) the stage of the title V permitting or oversight process at issue; (ii) the NSR permit's origin (*i.e.,* from a SIP or a FIP); (iii) the type of substantive NSR requirement at issue (*e.g.,* NSR permit terms or major NSR applicability); and (iv) the procedures by which the NSR permit is incorporated into the title V permit (*e.g.,* sequentially or concurrently issued permits).[5] However, there are limited situations in which the title V permitting process is the appropriate venue for ensuring that the title V permit includes and assures compliance with all NSR-related requirements of the SIP, including relatively rare situations in which the applicable SIP requirements governing a construction project have not been conclusively established outside of the title V permitting process, or limited examples in which NSR issues and title V issues involve substantive overlap.

Section III.E of this preamble further discusses the impacts of this final rule. Entities potentially affected by this final rule include State, local, and Tribal air pollution control agencies that administer title V operating permit programs (''permitting authorities''), owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits, and any person or group that participates in the title V permitting process. Overall, this rule provides additional clarity about the appropriate role of title V oversight authorities and the appropriate mechanisms to address concerns with NSR permits.

Section IV of this preamble addresses a distinct and severable topic related to the ''General Duty Clause'' of CAA section 112(r)(1), which concerns the prevention of accidental releases of hazardous substances. This rule codifies the EPA's well-established position that this General Duty Clause is not an ''applicable requirement'' and is not implemented through title V.

II. Background on Title V Operating Permits and CAA ''Applicable Requirements''

This section of the preamble contains background information on the title V program and explains how different types of ''applicable requirements'' of the CAA are treated in title V permits. This discussion is intended for informational purposes only to clarify multiple related topics that may have been a source of confusion to the public, regulated entities, and permitting authorities over the years. As explained in the January 2024 Proposed Rule, the EPA does not intend to and is not changing the Agency's longstanding interpretations or policies discussed in this section. The interpretations recounted in this section are consistent with, and accurately reflected in, the EPA's existing regulations in 40 CFR parts 70 and 71.

A. The Title V Permitting Process, Public Participation, and the EPA's Oversight Role

Congress amended the CAA in 1990 to add, among other provisions, title V.[6] Title V established an operating permit

[4] 40 CFR 70.2 and 71.2.

[5] This final rule does not include any regulatory changes associated with one particular mechanism used to incorporate NSR permits into title V permits, known as ''enhanced NSR.'' That aspect of the January 2024 Proposed Rule—which is not closely related to the core issues associated with this rulemaking—is severed from and not addressed by this final rule.

[6] CAA Amendments of 1990, Public Law 101–549, sections 501–507, 104 Stat. 2399, 2635–48 (1990) (codified at 42 U.S.C. 7661–7661f).

program for major sources of air pollution and certain other sources.

The title V program, like other provisions of the CAA, involves cooperative federalism, meaning that responsibility for the program is divided between States and the EPA. Under title V, States were required to develop and submit to the EPA for approval title V permitting programs consistent with requirements promulgated by the Agency in 40 CFR part 70.[7] Most States, certain local agencies, and one Tribe now have approved part 70 programs.[8] Under these EPA-approved State programs, permitting authorities issue the vast majority of title V permits (this preamble refers to such permits as ''State-issued'' permits). The EPA directly issues title V permits only in limited circumstances.[9]

Most title V permit actions (including initial permits, renewal permits, and significant permit modifications) involve public notice, an opportunity for comment, and a hearing on draft permits and revisions.[10] The CAA also provides for judicial review of final title V permit actions through State courts.[11] These provisions are similar to those provided in other CAA programs.

Additionally, Congress provided the EPA and the public with unique oversight tools for State-issued title V permits. The CAA requires permitting authorities to submit a proposed title V permit to the EPA Administrator for review before issuing a final permit.[12] The Administrator shall object to issuance of a proposed permit within 45 days if the Administrator determines that the permit does not satisfy the applicable requirements of the CAA or the requirements of 40 CFR part 70.[13] If the Administrator does not object to a permit during the 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action (''title V petition'').[14] Many of the issues concerning ''applicable requirements'' that are addressed in this final rule have been raised and addressed in title V petitions and the EPA's orders responding to such petitions.[15] Generally, the Administrator's denial of a title V petition is a locally or regionally applicable action subject to judicial review in the U.S. Court of Appeals for the appropriate circuit under CAA section 307(b).[16]

The CAA also provides the EPA with the authority, at the Agency's discretion, to determine that cause exists to ''terminate, modify, or revoke and reissue'' a State-issued title V permit.[17] This process is often called ''reopening for cause'' and is described in 40 CFR 70.7(f) and (g). Among other criteria, a permit may be reopened for cause when necessary to assure compliance with applicable requirements.[18]

Although this rule is primarily focused on the EPA's oversight of State-issued title V permits, the concepts discussed in this preamble related to ''applicable requirements'' are relevant to nearly all aspects of the title V permitting process in some regard. For example, these concepts guide the information that permittees must include in title V permit applications, the required content of title V permits drafted and issued by permitting authorities (including the EPA), the scope of issues properly subject to the public's input during the title V permitting process, and the scope of issues considered by the EPA in exercising the Agency's oversight authorities (including the EPA's review of title V permits issued by States and consideration of title V petitions on those permits).

B. Purpose and Function of Title V Permits

The title V permitting program was created to assist with compliance and enforcement of air pollution controls established under other CAA programs. Before this program existed, the CAA pollution control requirements that might apply to a source could be found in many different provisions of the CAA along with various Federal and State regulations and permits. One court opinion summarized the relationship between title V and other CAA programs as follows:

> Under the regulatory regime established by the [CAA], emission limits for pollutants and monitoring requirements that measure compliance applicable to any given stationary source of air pollution are scattered throughout rules promulgated by states or EPA, such as [SIPs], new source performance standards [NSPS], and national emission standards for hazardous air pollutants [NESHAP]. Before 1990, regulators and industry were left to wander through this regulatory maze in search of the emission limits and monitoring requirements that might apply to a particular source. Congress addressed this confusion in the 1990 Amendments by adding title V of the Act, which created a national permit program that requires many stationary sources of air pollution to obtain permits that include relevant emission limits and monitoring requirements.[19]

Thus, one key function of title V is to consolidate the applicable requirements established under other CAA programs. This consolidation function is embodied in CAA section 504(a), which states, in part: ''Each permit issued under this subchapter shall include enforceable emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.'' [20] The EPA's regulations implementing title V contain language similar to the statute.[21] The EPA's regulations also require: ''The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.'' [22]

In addition to consolidating applicable requirements, CAA section 504 provides the EPA with the authority to use title V permits to establish additional requirements necessary to assure compliance with those applicable requirements. For example, title V permits may be used to create or supplement monitoring requirements, when necessary, to assure compliance with underlying applicable

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[7] 42 U.S.C. 7661a(b), (d). For information about EPA oversight of the content and implementation of EPA-approved State part 70 programs, see 42 U.S.C. 7661a(i) and 40 CFR 70.10.

[8] *See* 40 CFR part 70, appendix A (Approval Status of State and Local Operating Permits Programs).

[9] Under 40 CFR part 71, the EPA (or an agency delegated to issue permits on the EPA's behalf) issues title V permits to sources in most areas of Indian country, on the Outer Continental Shelf, in jurisdictions where the EPA has determined that a State has not adequately implemented its part 70 program, and in situations in which a State has not satisfied an EPA objection to, or reopening of, a State-issued permit. *See* 40 CFR 71.4.

[10] 42 U.S.C. 7661a(b)(6); 40 CFR 70.4(d)(3)(iv), 70.7(h).

[11] 42 U.S.C. 7661a(b)(6); 40 CFR 70.4(b)(3)(x) through (xii).

[12] 42 U.S.C. 7661d(a)(1); 40 CFR 70.8(a).

[13] 42 U.S.C. 7661d(b)(1); 40 CFR 70.8(c).

[14] 42 U.S.C. 7661d(b)(2), 40 CFR 70.8(d), 70.12, 70.13, 70.14.

[15] For more information about title V petitions, see the preambles of the proposed and final rule ''Revisions to the Petition Provisions of the Title V Permitting Program,'' 81 FR 57822 (August 24, 2016) and 85 FR 6431 (February 5, 2020). Copies of petitions and the EPA's petition orders are available on the EPA's public title V petition database, *https://www.epa.gov/title-v-operating-permits/title-v-petition-database*.

[16] 42 U.S.C. 7661d(b)(2), 7607(b)(1).

[17] 42 U.S.C. 7661d(e).

[18] 40 CFR 70.7(f)(1)(iv).

[19] *Sierra Club* v. *EPA*, 536 F.3d 673, 674 (D.C. Cir. 2008) (citations omitted).

[20] 42 U.S.C. 7661c(a).

[21] *See* 40 CFR 70.6(a)(1), 71.6(a)(1). The EPA's regulations also define the specific ''applicable requirements'' with which each title V permit must assure compliance. 40 CFR 70.2 and 71.2. The definition and concept of ''applicable requirements'' are discussed in more detail later in this preamble.

[22] 40 CFR 70.6(a)(1)(i), 71.6(a)(1)(i).

requirements that do not themselves contain sufficient monitoring provisions.[23] Various compliance assurance requirements are included within title V and the EPA's implementing regulations; not all are restricted to monitoring.[24]

Beyond title V's consolidation and compliance assurance functions, title V generally does not impose new pollution control requirements on sources or provide a vehicle to modify such requirements established under other CAA programs. Thus, the EPA's regulations expressly provide: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While *title V does not impose substantive new requirements,* it does require that . . . certain procedural measures be adopted especially with respect to compliance.'' [25] For additional information about the purpose and function of title V, see section III.C.2 of this preamble.

In summary, the title V operating permit program is a vehicle for compiling air quality control requirements from other CAA programs and for providing requirements necessary to assure compliance with such requirements, but not for creating or changing applicable requirements. Put simply, title V is a catch-all, not a cure-all. The discussion throughout the remainder of this preamble builds upon these longstanding general principles, which the EPA is not changing with this rulemaking.

C. Regulatory Definition of ''Applicable Requirements''

As previously explained, CAA section 504(a) requires that title V permits ''include enforceable emissions limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.'' [26] However, the term ''applicable requirements'' is not defined in the CAA and the statute does not otherwise specify how to determine the ''applicable requirements of this chapter'' for a particular source. When the EPA developed regulations to implement the title V program, the Agency defined the term ''applicable requirement'' as it relates to title V permitting. This subsection of the preamble addresses general topics associated with this regulatory definition. The subsections that follow elaborate on these general concepts with examples of how these concepts impact different types of requirements.

Initially, it is important to recognize that ''applicable requirement'' is a legal term of art with a precise meaning that is unique to title V. The meaning of ''applicable requirement'' is closely aligned with the primary function of title V permits: to consolidate and assure compliance with the substantive requirements established under other CAA programs. Thus, the EPA's definition of ''applicable requirement'' focuses on those substantive requirements of other CAA programs that must be incorporated into a source's title V permit and with which the title V permit must assure compliance. This means that not all CAA requirements are considered ''applicable requirements'' for title V purposes. However, the fact that some CAA requirements are not considered ''applicable requirements'' for title V purposes does not diminish the independent enforceability or importance of those requirements. It simply means that those requirements are not primarily implemented or enforced through title V permits.

The EPA's regulations define ''applicable requirement'' to mean ''all of the following as they apply to emissions units in a part 70 source,'' [27] followed by a list of 13 types of CAA-based standards or conditions.[28]

Perhaps the most straightforward aspect of this definition is that, to qualify as an ''applicable requirement'' for title V purposes, the requirement must be based on (*i.e.,* derived from) the CAA and, more specifically, one of the CAA sections identified in this definition. Requirements that are not based on (*i.e.,* derived from) the CAA are not ''applicable requirements'' of the CAA with which a title V permit must assure compliance. Further, not all CAA requirements qualify as ''applicable requirements'' for title V purposes. Some sections of the CAA were intentionally omitted from the list of 13 types of ''applicable requirements'' because these sections either do not apply to stationary sources that must obtain title V permits or are not implemented through title V for other reasons. For more information on requirements that are not ''applicable requirements,'' see section II.D.2 of this preamble.

A similarly important definitional element is that ''applicable requirements'' only include the listed types of CAA requirements ''as they apply to emission units in a part 70 source.'' [29] Requirements of the CAA that do not directly apply to a source's emission units are not ''applicable requirements'' for title V purposes, as discussed further in section II.D.3 of this preamble.

Additionally, the requirements of title V itself (and the EPA's 40 CFR parts 70 and 71 implementing regulations) are

[23] *See* 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d 673, 674–45, 680 (D.C. Cir. 2008) (''Title V did more than require the compilation in a single document of existing applicable emission limits and monitoring requirements. It also mandated that '[e]ach permit issued under [Title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.' . . . [T]he Act requires: a permitting authority may supplement an inadequate monitoring requirement so that the requirement will 'assure compliance with the permit terms and conditions.' '' (citations omitted)); *see also, e.g., In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant,* Order on Petition No. VI–2007–01 at 6–8 (May 28, 2009).

[24] 42 U.S.C. 7661c(a), (b), and (c); 40 CFR 70.6(a)(1) and(3), (c), 71.6(a)(1) and(3), and (c).

[25] 40 CFR 70.1(b) (emphasis added).

[26] 42 U.S.C. 7661c(a). Similar requirements appear in other parts of title V. ''Schedule of compliance. The term 'schedule of compliance' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.'' 42 U.S.C. 7661(3). ''Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.'' 42 U.S.C. 7661a(a). Permitting authorities ''have adequate authority to . . . issue permits and assure compliance . . . with each applicable standard, regulation, or requirement under this chapter.'' 42 U.S.C. 7661a(b)(5). The regulations to implement the program shall include a ''requirement that the applicant submit with the application a compliance plan describing how the source will comply with all applicable requirements under this chapter.'' 42 U.S.C. 7661b(b). However, like CAA section 504, these sections do not specify the scope of the term ''applicable requirements'' or how the permitting authority or the EPA is to determine what the applicable requirements are for a source as part of its title V permit.

[27] This definition also indicates that requirements that have been promulgated or approved at the time of permit issuance, but with which the source is not yet required to comply, are applicable requirements that must be included in a title V permit. *See* 40 CFR 70.2 and 71.2. In such cases, the title V permit should indicate the relevant future compliance date. The EPA is not aware of any issues or confusion concerning this element of the definition, which is not discussed further in this preamble.

[28] 40 CFR 70.2; *see* 40 CFR 71.2 (similar definition). The list includes, in summary, requirements from: (1) SIPs and FIPs under CAA title I; (2) preconstruction permits under CAA title I; (3) CAA section 111 (NSPS and existing source rules); (4) CAA section 112 (NESHAP); (5) title IV (acid rain); (6) CAA sections 504(b) or 114(a)(3) (certain types of enhanced monitoring); (7) CAA section 126(a)(1) and (c) (interstate pollution); (8) CAA section 129 (solid waste incineration); (9) CAA section 183(e) (consumer and commercial products); (10) CAA section 193(f) (tank vessels); (11) CAA section 328 (outer continental shelf permits); (12) CAA title VI (stratospheric ozone); and (13) any NAAQS, but only as it would apply to temporary sources under CAA section 504(e).

[29] 40 CFR 70.2; *see* 40 CFR 71.2 (similar definition).

not technically considered ''applicable requirements'' but are nonetheless centrally important to title V permitting. For more information, see section II.D.4 of this preamble.

Not all ''applicable requirements'' are treated the same in title V permits. Some applicable requirements can be described as ''self-implementing.'' Once established, those requirements should entail little to no review through the title V permitting process. Other applicable requirements may require further evaluation to define the precise requirements that apply to individual emission units. In certain circumstances, the latter type of applicable requirements may be further defined using the title V permitting process. These topics are discussed in more detail in sections II.E. and II.F of this preamble.

D. Requirements That Are Not ''Applicable Requirements'' for Purposes of Title V Permitting

Sources subject to title V may be subject to a variety of other requirements both within and beyond the CAA. Not all of these requirements are ''applicable requirements'' that must be included in a title V permit. Requirements that are not applicable requirements fall into several categories, discussed in the following subsections.

1. Requirements Not Derived From the CAA

Many sources subject to title V are also subject to Federal laws beyond the CAA, including environmental laws administered by the EPA or other Federal agencies (*e.g.,* Clean Water Act (CWA); Safe Drinking Water Act; Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response, Compensation, and Liability Act; National Environmental Policy Act, Emergency Planning and Community Right-to-Know Act, Endangered Species Act, and other statutes). These other Federal laws, including the statutes and any implementing regulations, are not ''applicable requirements'' for title V purposes. Such requirements should not be included in title V permits, and title V permits should not assure compliance with these requirements. Further, whether a permittee or permitting authority has satisfied those requirements is beyond the scope of issues that the EPA can address through the Agency's title V-based oversight authorities, including our objection authority and public petition opportunity.[30] This is self-evident from the plain language of the CAA and the EPA's regulations, which limit the Agency's objection authority to permits that ''are not in compliance with the applicable requirements of [the CAA].'' [31] Nonetheless, the EPA sometimes receives title V petitions requesting the Agency's objection to the issuance of operating permits on the basis of alleged violations of laws other than the CAA. The EPA has denied all of those petition claims.[32]

Other Federal authorities are sometimes invoked in the context of title V permitting (and, in particular, title V petitions), including Presidential Executive Orders (E.O.s). Because E.O.s are not legally binding for State permitting authorities and are generally not based on the CAA, they do not establish ''applicable requirements'' that States must implement through title V permitting. Accordingly, the EPA has denied title V petition claims alleging that State permitting authorities failed to satisfy E.O.s.[33]

Many State permitting authorities have air quality laws that are not derived from the CAA and/or are not included as part of an EPA-approved State program.[34] These ''State-only'' requirements are not enforceable by the EPA and are not applicable requirements for title V purposes. Thus, these requirements do not need to be included in title V permits, title V permits do not need to assure compliance with these requirements, and these requirements are beyond the scope of the EPA's title V oversight tools. For these reasons, the EPA has denied numerous title V petition claims alleging that title V permits fail to satisfy State-only requirements.[35]

State permitting authorities may, at their discretion, include State-only requirements within title V permits, but they are required to designate such permit terms as ''State-only'' or ''not federally enforceable.'' [36] Again, these requirements are not ''applicable requirements'' for purposes of title V permitting. Thus, from the EPA's perspective, properly labeled State-only permit terms are not considered part of the title V permit; they may be present in the title V permit, but they are not legally federally enforceable. As such, these permit terms are not subject to the EPA's objection authority or the title V petition process.[37] The EPA has denied many title V petition claims challenging the content of State-only permit terms.[38] Note that the CAA requires States to provide the public with an opportunity to raise concerns with any conditions of a title V permit, including State-only requirements, through judicial review in State court systems.[39] This opportunity exists in parallel to the unique oversight authorities (*e.g.,* the EPA's objection authority and public petition opportunity) that extend only to federally enforceable requirements of title V permits.

2. CAA Requirements That Are Not Specifically Identified in 40 CFR 70.2

The CAA is a large and complex statute composed of many different programs. Not all of these programs are implemented in the same manner through title V or establish ''applicable requirements'' for title V purposes.

One notable example is title II of the CAA, which concerns emission standards for internal combustion engines in mobile sources and nonroad engines. Even if emission units subject to title II are located at a stationary source, they are not regulated as a stationary source because they are excluded from the definition of ''stationary source.'' [40] Thus, title II

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[30] The EPA's regulations provide that title V permit issuance may be coordinated with the issuance of permits under the CWA and RCRA, but that does not mean those other requirements are subject to review through title V. *See* 40 CFR 70.1(e) and 71.1(d).

[31] 42 U.S.C. 7661d(b)(1), (2); *see* 40 CFR 70.8(c)(1) and 70.12(a)(2).

[32] *See, e.g., In The Matter of Gateway Generating Station,* Order on Petition No. IX–2013–1 at 12–14 (October 15, 2014); *In the Matter of Monroe Electric Generating Plant,* Order on Petition No. 6–99–2 at 27 (June 11, 1999).

[33] *See, e.g., In the Matter of AK Steel Dearborn Works,* Order on Petition No. V–2016–16 at 17–19 (January 15, 2021) (*AK Steel Order*); *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,* Order on Petition No. II–2000–07 at 32–33 (May 2, 2001) (*Pencor-Masada I Order*). Note that Federal executive orders may be more directly relevant to EPA-issued title V permits under 40 CFR part 71 (as well as other types of EPA-issued permits).

[34] This includes requirements that may be designed to implement a CAA requirement but which the EPA has not yet approved (including SIPs, State plans under CAA section 111(d), and State programs under CAA section 112(l), and Part 70 programs).

[35] *See, e.g., In the Matter of Salt River Project Agricultural Improvement & Power District, Agua Fria Generating Station,* Order on Petition No. IX–2022–4 at 14 (July 28, 2022) (*SRP Agua Fria I Order*); *In the Matter of Shintech, Inc.,* Order on Petition at 14 (September 10, 1997) (*Shintech I Order*).

[36] 40 CFR 70.6(b)(2).

[37] *Id.*

[38] *See, e.g., In the Matter of Harquahala Generating Station Project,* Order on Petition at 5 (July 2, 2003) (*Harquahala Order*).

[39] 42 U.S.C. 7661a(b)(6); 40 CFR 70.4(b)(3)(x) through (xii).

[40] *See* 42 U.S.C. 7602(z). Questions sometimes arise regarding whether an internal combustion engine located at a stationary source should be considered a nonroad engine (subject to title II) or a part of the stationary source. *See, e.g.,* 42 U.S.C.

requirements are not included within the EPA's regulatory definition of ''applicable requirement.''

Other substantive CAA programs relevant to stationary sources are similarly not identified in the EPA's regulatory definition of ''applicable requirement'' for title V purposes because Congress did not intend for them to be implemented through the title V program. For further information about one example, the ''General Duty Clause'' concerning the prevention of accidental releases of hazardous substances under CAA section 112(r)(1), see section IV of this preamble.

Some CAA provisions are more general and do not impose substantive requirements that are incorporated into title V permits. For example, title III of the CAA includes general provisions related to a number of cross-cutting topics.[41] Although some of these requirements may directly or indirectly impact title V permitting, most provisions within title III are not ''applicable requirements'' for title V purposes.[42]

3. Requirements That Do Not Apply to Emission Units

Not all requirements from CAA programs identified in the EPA's regulatory definition of ''applicable requirement'' are considered applicable requirements for title V purposes. This is because the definition only includes such requirements ''as they apply to emission units in a part 70 source.''[43] Applicable requirements generally include the substantive requirements from other CAA provisions that dictate the ongoing operations of emission units at the source. As the name of this program suggests, title V operating permits are fundamentally designed to specify the conditions under which a source's emission units must operate. Further, a key purpose of the title V program is to assure that the source complies with the requirements to which it is subject.[44]

Therefore, requirements of the CAA that do not directly apply to individual emission units at a part 70 source are not ''applicable requirements'' for title V purposes. Many of the CAA provisions that do not apply to emission units at a title V source can be described as programmatic or procedural. For example, CAA requirements that specify actions that the EPA must take to establish or oversee different CAA programs (such as promulgating rules, taking action on State rules, and other programmatic oversight activities) are not applicable requirements that need to be reflected in a source's title V permit.[45] Similarly, the CAA requires State air agencies to undertake various activities related to the establishment and implementation of different CAA programs, including attainment planning requirements (*e.g.,* in developing SIPs).[46] State permitting authorities are also subject to various requirements related to the issuance of non-title V permits (*e.g.,* NSR permits).[47] In general, Congress did not intend for the title V program to serve as a vehicle to catch or correct programmatic or procedural problems associated with the establishment of applicable requirements in other CAA programs.[48] Instead, the title V program was designed to ensure that regulated sources comply with all the substantive emission control requirements to which they are subject. Thus, to the extent these requirements only directly regulate EPA or State actions, and do not result in requirements directly applicable to emission units at a title V source, they are not applicable requirements for title V purposes.

The CAA contains many cross-cutting general provisions (*e.g.,* in title III) that are not considered applicable requirements because they do not directly apply to emission units at part 70 sources.[49] The same is true for various cross-cutting regulatory provisions. To the extent these provisions are relevant to the implementation or enforcement of the title V program, they are independently enforceable and do not need to be specified in a title V permit. One example that often arises in the context of title V petitions is that of ''credible evidence.'' The EPA, States, and citizens can use any credible evidence to prove compliance and non-compliance with the CAA, including compliance and non-compliance with title V permits.[50] The EPA has repeatedly determined that title V permits need not include language affirmatively restating the existence of this principle.[51]

4. ''Part 70 Requirements''

The EPA uses different terminology to refer to different types of CAA requirements. As previously stated, the term ''applicable requirement'' refers to substantive CAA requirements arising from other CAA programs beyond title V, which are generally not subject to further review during the title V permitting process.

By contrast, the requirements within title V and the EPA's parts 70 and 71 regulations governing the content of title V permits and the process used to issue them are not technically considered ''applicable requirements.''[52] Instead, the EPA generally refers to these as ''part 70 requirements.''[53] Unlike most applicable requirements, part 70 requirements are established or satisfied

7550(10); 7602(z); 40 CFR 1068.30. This topic is beyond the scope of this rulemaking.

[41] *See* 42 U.S.C. 7601–28.

[42] One notable exception is the Outer Continental Shelf permitting requirements under CAA section 328, which are considered applicable requirements for title V purposes. 42 U.S.C. 7627; 40 CFR 70.2 and 71.2.

[43] 40 CFR 70.2 and 71.2.

[44] 42 U.S.C. 7661a(a).

[45] *See, e.g., In the Matter of Hu Honua Bioenergy Facility,* Order on Petition No. IX–2011–1 at 6–7 (February 7, 2014) (*Hu Honua I Order*).

[46] *See, e.g., In the Matter of Exxon Chemical Americas, Baton Rouge Polyolefins Plant,* Order on Petition No. 6–00–1 at 10–11 (April 12, 2000).

[47] *See, e.g., In the Matter of Century Aluminum of South Carolina, Inc.,* Order on Petition No. IV–2023–09 at 19–20 (November 2, 2023) (*Century Aluminum Order*). However, note that there are limited circumstances under which procedural issues associated with other CAA programs (namely, the issuance of NSR permits) may be implicated in title V. See section III.D.5.b of this preamble for further discussion.

[48] By contrast, issues related to the procedures used to issue a title V permit are of central relevance to the title V program, and the unique title V oversight tools available to the EPA and the public generally may be used to address those deficiencies. See section II.D.4 of this preamble for more information on such 40 CFR part 70 requirements.

[49] These general provisions are not considered applicable requirements for two reasons: (i) they are not specified within the regulatory definition's list of 13 types of CAA requirements (as discussed in the preceding subsection of the preamble), and (ii) they do not apply to emission units at a source (as discussed in this subsection).

[50] 42 U.S.C. 7413(a), 7604(a)(1), 7604(f)(4); 62 FR 8314 (February 24, 1997).

[51] *See, e.g., In the Matter of Plains Marketing LP and Four Other Facilities,* Order on Petition Nos. IV–2023–1 & IV–2023–3 at 50 (September 18, 2023). Note that the EPA has also indicated that title V permits cannot be drafted in such a way that would preclude the use of all credible evidence in enforcement proceedings. *See, e.g., In the Matter of Valero Refining-Texas, L.P., Valero Houston Refinery,* Order on Petition No. VI–2021–8 at 70 (June 30, 2022) (*Valero Houston Order*).

[52] Part 70 requirements do not meet the regulatory definition of ''applicable requirement'' because they are not included within the definition's list of 13 types of CAA requirements. Moreover, some part 70 requirements (*e.g.,* procedural requirements) do not directly apply to emission units.

[53] The phrase ''part 70 requirements'' is based on various portions of the part 70 regulations that refer to the ''requirements of this part'' as a distinct, and additional, source of requirements for title V permits from ''applicable requirements'' based on other CAA programs. *See* 40 CFR 70.4(b)(3)(v), 70.6(a)(9)(iii), 70.6(a)(10)(iii), 70.7(a)(1)(iv), 70.8(b)(2), 70.8(c)(1), and 70.12(a)(2). This concept is also relevant with respect to EPA-issued permits under 40 CFR part 71, in which a similar distinction exists between ''applicable requirements'' derived from other CAA programs and the requirements of part 71 that are derived from title V of the CAA. *See, e.g.,* 40 CFR 71.10(g)(1). However, given that this issue most often arises in the context of State-issued part 70 permits, this preamble uses the term ''part 70 requirements'' to refer to requirements derived from title V.

in the first instance through title V and are, therefore, subject to review using the unique title V oversight tools.

For example, the requirements that dictate the content of title V permits are part 70 requirements (not applicable requirements). These include, for example, the requirement that title V permits include and assure compliance with ''applicable requirements'' established elsewhere and the authority to impose, as necessary, additional monitoring and other compliance assurance provisions.[54] Further, the requirements related to public participation in title V permits, the availability of information, and related procedural requirements are all part 70 requirements (not applicable requirements).[55] Title V and the part 70 regulations contain other unique title V authorities, such as the ''permit shield'' under CAA section 504(f) and 40 CFR 70.6(f).[56] These part 70 requirements are subject to the additional oversight mechanisms unique to title V.

E. Self-Implementing Applicable Requirements (e.g., NSPS, NESHAP)

This subsection addresses applicable requirements with the most straightforward title V implementation, often referred to as ''self-implementing'' or ''self-executing'' requirements. The hallmark of a self-implementing requirement is that the underlying statutory or regulatory provision defines it with enough specificity for the requirement to be independently and immediately enforceable, even before a source goes through the permitting process. These applicable requirements require no further case-specific decision making (*e.g.,* through a permitting process) to define the precise requirements to which a source is subject. Such requirements consist of prescribed emission standards, operational limitations, testing, monitoring, recordkeeping, reporting, and other compliance assurance requirements. These requirements are explicitly identified within EPA regulations (*e.g.,* NSPS under CAA section 111, NESHAP under CAA section 112, Federal Plans under CAA section 111(d), similar rules under CAA section 129, or FIPs under CAA section 110(c)) or EPA-approved State regulations (*e.g.,* SIPs under CAA section 110(a) or State Plans under CAA sections 111(d) or 129).

Such self-implementing applicable requirements should be included in, or incorporated into, a title V permit without further review.[57] It would not be appropriate, for example, to use the title V permitting process to reevaluate the stringency of a Maximum Achievable Control Technology (MACT) standard promulgated by the EPA through rulemaking under CAA section 112.[58] The same is true with respect to the content of self-implementing standards contained in SIPs, as discussed further in section II.G of this preamble.

Central to the concept of ''applicable requirements'' is that each applicable requirement is established through its own statutorily proscribed process, which includes the ability for the public to participate in the development of the requirement and for interested parties to challenge its content. For example, the EPA regulations referenced in the preceding paragraphs undergo administrative proceedings under CAA section 307, which establishes various procedural and public participation-related requirements, as well as the opportunity for judicial review of final regulations.[59] The promulgation and approval of SIPs often involves two such rulemakings—one at the State level and one at the Federal level. Thus, the fact that self-implementing applicable requirements are not substantively reevaluated through title V does not mean that interested parties are without recourse. Rather, it means that the title V permitting process was not designed to review and does not authorize review of these previously finalized applicable requirements.

Given title V's key role in consolidating applicable requirements, questions often arise during the permitting process as to which CAA requirements are applicable to a given source or emission unit. To the extent that applicability is clearly established within the applicable requirement itself (*e.g.,* a source-specific SIP provision), applicability would not be subject to further scrutiny through title V. In situations where the applicability of a ''self-implementing'' requirement to a particular source has not been conclusively established prior to title V permit issuance, the title V permitting process can and should be used to determine which requirements apply to the source so that the title V permit can include and assure compliance with those requirements. For example, determining which NSPS or NESHAP subpart is applicable to a source may require further site-specific factual analysis through the title V permitting process. Additionally, within a given NSPS or NESHAP rule, there may be multiple different sets of requirements (*e.g.,* subcategories) that apply differently to emission units with different characteristics. In these situations, it may be necessary to use the title V permitting process to identify which specific requirements within a NSPS or NESHAP rule apply.

Finally, although substantive requirements that are self-implementing may not be second-guessed, the title V permitting process may be used to determine whether additional compliance assurance provisions (*e.g.,* monitoring) are necessary.[60] Further guidance on determining the sufficiency of monitoring and other compliance assurance provisions is beyond the scope of this final rule.

F. Requirements Defined Through Title V Permitting

Although title V generally does not impose or establish substantive new requirements, title V permits sometimes serve as the vehicle to further define applicable requirements from other CAA programs that are general in nature. This may occur when the underlying applicable requirement provides general direction and requires further source-specific analysis to define the precise requirements that apply to a given source or emission unit. Some underlying applicable requirements expressly identify title V permits as the vehicle for this analysis; others may be more open-ended about the vehicle used to define the applicable requirement; and still others may specify a different vehicle for establishing these requirements (*e.g.,* NSR permits, discussed further in section III of this preamble).

Unlike applicable requirements that are established fully elsewhere, if the details of an applicable requirement are defined for the first time through the title V permitting process, questions about the content of such an applicable requirement are subject to title V's

[54] *See, e.g.,* 40 CFR 70.6(a) and (c).

[55] *See* 40 CFR 70.7(h).

[56] The permit shield is discussed in more detail in section III.E.2.a of this preamble, to the extent it impacts NSR permitting decisions.

[57] The manner in which such requirements may be included in, or incorporated by reference into, a title V permit is beyond the scope of this rulemaking. For more information about incorporation by reference, see, for example, *In the Matter of ExxonMobil Corp., Baytown Chemical Plant,* Order on Petition No. VI–2020–9 at 16–19 (March 18, 2022) (*ExxonMobil Baytown Chemical Order*) and *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program,* 36–41 (March 5, 1996).

[58] *See, e.g., In the Matter of Borden Chemical, Inc. Formaldehyde Plant,* Order on Petition No. 6–01–1 at 48–49 (December 22, 2000).

[59] 42 U.S.C. 7607(b)–(d).

[60] *See* 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d at 680.

unique oversight tools, including the EPA's objection authority and the public petition opportunity.

For example, CAA section 112(g) requires the development of case-by-case MACT limits prior to certain construction activities at a major source of hazardous air pollutants (HAPs) for which there is no NESHAP under CAA section 112(d).[61] These limits can—and in some cases, must—be established through the title V process. If a title V permit is used to establish a case-by-case MACT limit, questions about both the applicability and the content of such a limit (*i.e.,* whether the limit properly reflects MACT) are subject to the unique oversight tools of title V.[62]

Other requirements of CAA section 112 NESHAP and section 111 NSPS regulations may require further definition through, for example, various types of site-specific operational plans. These plans are developed outside of the title V permitting process, but to the extent they are necessary to impose or assure compliance with an applicable requirement of the NSPS or NESHAP, they must be included or incorporated into title V permits.[63] The title V permitting process may also be used for similar case-by-case decisions based on underlying SIP provisions, as discussed further in the following subsection of this preamble.

In these situations, it is not the title V permit that establishes the applicable requirement. The applicable requirement is still based on the underlying statutory or regulatory provision, but the title V permit defines the precise details of the applicable requirement. Essentially, the title V permitting process is used to identify the specific ''enforceable emission limitations and standards'' and to develop ''such other conditions as are necessary to assure compliance with the [more general underlying] applicable requirements . . . .'' [64] Absent an underlying CAA-based authority, title V permits should not be used to impose new substantive requirements.[65]

G. Applicable Requirements Related to the NAAQS and SIPs

The NAAQS promulgated or revised under CAA section 109 are not themselves applicable requirements because they do not apply directly to sources.[66] That is, the promulgation or revision of a NAAQS does not, in and of itself, automatically result in emission limits or other control measures applicable to a source. Instead, the NAAQS may create, subject to the area designation process and various additional statutory considerations and processes, an obligation on States to develop SIPs (and on the EPA to promulgate FIPs, as necessary) that contain requirements necessary to achieve and maintain the NAAQS.[67] The specific measures contained in each State's EPA-approved SIP to achieve the NAAQS are the applicable requirements with which sources must comply.[68] For purposes of title V permitting, this means that absent a specific directive in an EPA-approved SIP, a State does not have any general obligation to establish emission limitations or other standards within a title V permit to protect the NAAQS. Whether it may be necessary to establish such NAAQS-focused limitations in a title V permit depends on the relevant terms of the approved SIP.

Some applicable requirements in SIPs could be described as ''self-implementing'' in a manner similar to the EPA's NSPS and NESHAP requirements discussed in section II.E of this preamble. For example, a SIP provision may impose a numerical emission limit or operational limit on a specifically identified source. Or, a SIP provision, ''permit by rule,'' or ''general permit'' within the SIP may impose similar requirements on a category of sources or emission units. Such requirements should be included in the source's title V permit without further review (except, of course, to ensure that the permit contains sufficient monitoring and other compliance assurance conditions). Nonetheless, the EPA has received many title V petitions challenging such requirements contained in an EPA-approved SIP. Some petitions have directly challenged the SIP provision itself, asserting that the SIP requirement was incorrectly established or failed to satisfy certain legal requirements governing SIPs. More often, petitions have challenged permit terms that repeat verbatim an approved SIP provision; such claims effectively challenge the SIP itself. As the EPA has explained in those circumstances, if an alleged problem lies with the content of the SIP, the proper remedy would be petitioning the EPA to make a ''SIP Call'' under CAA section 110(k), not a title V petition. Until the EPA approves a corrective SIP revision or issues a FIP, the SIP provision remains an ''applicable requirement'' that should be incorporated unchanged into the title V permit. The EPA has consistently denied title V petition claims on this basis.[69]

Other SIP requirements are less specific and must be further defined in subsequent proceedings (generally before the State) that involve a fact-specific analysis of the relevant affected sources and emission units.[70] Depending on the nature of the SIP provisions at issue, this analysis may involve, for example, various methods of qualitatively or quantitatively assessing a source's impact on the NAAQS (including, but not limited to, ambient air dispersion modeling). This analysis may also result in case-by-case emission limits designed to protect the NAAQS. Determining the proper venue for satisfying or defining these general

[61] Under CAA section 112(g)(2), if the EPA has not established a MACT standard for a source category, the Agency or the State must establish a case-by-case MACT emission limit prior to certain construction activities at a major source of HAPs. 42 U.S.C. 7412(g)(2). Similarly, under CAA section 112(j)(2), if the EPA has not established a MACT standard for a source category, a new or existing major source's title V operating permit must include a case-by-case MACT limit. 42 U.S.C. 7412(j)(2); *see also* 40 CFR 63.40 through 63.44 (implementing regulations for CAA section 112(g)), and 63.50 through 63.56 (implementing regulations for CAA section 112(j)).

[62] *See* 61 FR 68384, 68393, 68395 (December 27, 1996) (''Where EPA determines that the MACT determination made by the permitting authority fails to meet any of the requirements of § 63.43 [and] where the MACT determination is made part of a source's Part 70 permit, EPA may veto issuance of the permit in accordance with the provisions of 40 CFR 70.8(c).''); *id.* at 68395 (''If, during the EPA's review of the section 112(g) determination, it becomes apparent that the determination is not in compliance with the Act, then EPA must object to the issuance or revision of that permit.''); *In the Matter of American Electric Power Service Corp., Southwest Electric Power Co., John W. Turk Plant,* Order on Petition No. VI–2008–01 at 15–16 (December 15, 2009); *In the Matter of Shintech Inc., PVC Plant,* Order on Petition No. 6–03–1 at 16–21 (July 3, 2003).

[63] *See, e.g., Valero Houston Order* at 25–26.

[64] 42 U.S.C. 7661c(a).

[65] 40 CFR 70.1(b).

[66] 42 U.S.C. 7409; *see* 40 CFR 70.2 (defining ''applicable requirement'' to include the NAAQS ''but only as it would apply to temporary sources''); 57 FR at 32276 (July 21, 1992) (''Under the Act, NAAQS implementation is a requirement imposed on States in the SIP; it is not imposed directly on a source. In its final rule, EPA clarifies that the NAAQS and the increment and visibility requirements under part C of title I of the Act are applicable requirements for temporary sources only.''); 56 FR at 21732–33 (May 10, 1991) (''The EPA does not interpret compliance with the NAAQS to be an 'applicable requirement' of the Act.'').

[67] 42 U.S.C. 7410(a)(1), (c)(1).

[68] 40 CFR 70.2.

[69] *See, e.g., In the Matter of Piedmont Green Power,* Order on Petition No. IV–2015–2 at 28–29 (December 13, 2016) (*Piedmont Green Power Order*); *In the Matter of Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants,* Order on Petition No. VIII–00–1 at 23–24 (November 16, 2000).

[70] *See, e.g.,* 56 FR at 21757 (May 10, 1991) (''Where SIP requirements are clear, the Part 70 permit must adopt these limitations and reestablish them as permit conditions that implement the SIP. Where the SIP requirements are ambiguous or absent, the permit could provide a way of resolving questions as to how the SIP applies and is enforced.'').

SIP requirements depends on the specific language contained in the SIP, as discussed in the following paragraphs.

In general, most SIP provisions provide that case-by-case decisions necessary to fulfill general SIP requirements will proceed either through subsequent rulemaking actions or through the NSR permitting process (as discussed in section III of this preamble).[71] Once established, the more specific requirements of the SIP, as defined through those processes, are generally not subject to further review during the title V permitting process.

However, some SIP requirements may be defined for the first time in a title V permit, in which case the contents of these requirements are reviewable using the unique title V oversight tools. Again, whether a SIP-based requirement is reviewable through the title V process depends on the specific SIP provision at issue. For example, the EPA has reviewed (and granted) title V petitions requesting analysis of a source's impacts on the NAAQS or case-specific emission limits designed to protect the NAAQS in situations in which the SIP provisions at issue specifically suggested that such requirements would be implemented through title V.[72] In such cases, the EPA has generally provided the permitting authority the opportunity to interpret the relevant SIP provisions and to explain the scope, timing, and applicability of these provisions as they relate to the source in question.

The EPA has also addressed other, more general SIP provisions that do not explicitly require any specific action during the title V process. These provisions often take the form of broad, general prohibitions on air pollution, and these SIP provisions are not always directly tied to the NAAQS or any specific Federal requirements. The EPA has explained that States have discretion under these general SIP provisions to determine that it is not necessary to impose source-specific limits through title V permits.[73] However, this does not prevent States from using title V to address such general requirements.[74]

Although uncommon, some SIP provisions expressly identify title V permits as a vehicle for establishing or modifying SIP-based limits. For example, some SIP provisions based on the EPA's Plantwide Applicability Limit (PAL) rules expressly identify title V renewal permits as a potential vehicle for adjusting a PAL.[75] If the title V process is specifically identified in an approved SIP as a means of establishing or defining an applicable requirement of the SIP, questions related to these requirements may be properly raised during the title V permitting process.

III. Interface Between NSR and Title V Permitting

Since the title V program was established in the early 1990s, the EPA, State permitting authorities, and other interested stakeholders have raised questions related to the intersection of the title I (NSR) preconstruction permitting programs and the title V operating permit program.[76] One question has persisted related to the situations in which, and the extent to which, the unique title V oversight tools should be used to address alleged deficiencies related to title I permitting decisions. This issue implicates various questions about the relationship between title V permits and applicable requirements established in other CAA programs, such as how to determine whether an applicable requirement is conclusively established, such that it should be incorporated into a title V permit without further substantive review, and whether applicable requirements established under NSR permitting programs should be treated the same as applicable requirements established under other CAA programs. The EPA's answer to these questions has changed over time, and two Federal circuit courts of appeals have reached differing conclusions as well, as discussed in section III.A of this preamble.

This final rule codifies the reasonable approach that the EPA has implemented on a case-by-case basis since 2017, as further described and justified in sections III.B., III.C, and III.D of this preamble. In short, provided that a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, that NSR permit establishes and defines the relevant NSR-related applicable requirements of the SIP (or FIP) for purposes of title V. As with applicable requirements established under other CAA authorities (*e.g.,* NSPS, NESHAP), the EPA will not reevaluate those NSR decisions through the title V process, which is not designed to authorize or require permitting authorities to second-guess prior NSR decisions when implementing title V.

A. Background: Historical and Current EPA Approaches

1. NSR Programs (1977–Present)

The title I (NSR) preconstruction permitting program was established before the title V operating permit program. The NSR program is based on the 1977 Amendments to the CAA. The overall NSR program is comprised of three sub-programs, as discussed later in this section of this preamble.

The NSR program was designed to protect public health and welfare from the effects of air pollution and to preserve and improve air quality throughout the Nation.[77] The NSR program requires certain stationary sources to obtain air permits prior to beginning construction. Construction of new sources and the modification of certain sources with emissions above

[71] *See, e.g., In the Matter of TransAlta Centralia Generation, LLC,* Order on Petition at 11–12 (April 28, 2011).

[72] *See In the Matter of In the Matter of Alabama Power Co., Barry Generating Plant,* Order on Petition No. IV–2021–5 at 11–14 (June 14, 2022) (granting a claim related to a SIP provision that required owner/operators of a certain type of source to ''[d]emonstrate, to the satisfaction of the [State], that sulfur oxides emitted, either alone or in contribution to other sources, will not interfere with attainment and maintenance of any primary or secondary [NAAQS]''); *In the Matter of Duke Energy, LLC, Asheville Steam Electric Plant,* Order on Petition No. IV–2016–06 at 11–17 (June 30, 2017) (granting claim related to a SIP requirement that ''the permit shall contain a condition requiring'' controls more stringent than the applicable emission standards when necessary to prevent a violation of the NAAQS—a provision the State had previously relied upon to establish limits in individual permits); *In the Matter of Duke Energy, LLC, Roxboro Steam Electric Plant,* Order on Petition No. IV–2016–07 at 10–15 (June 30, 2017) (same as *Duke Asheville*); *In the Matter of Public Service of New Hampshire, Schiller Station,* Order on Petition No. VI2014–04 at 8–13 (July 28, 2015) (granting claim related to a SIP requirement to ''apply special emission limits to the stationary sources on a case-by-case basis to insure [*sic*] that their air quality impacts'' do not interfere with NAAQS attainment in adjacent States).

[73] *See In the Matter of EME Homer City Generation LP and First Energy Generation Corp.,* Order on Petition Nos. III2012–06, III–2012–07, and III–2013–02 at 15–16 (July 30, 2014) (SIP provision stated ''No person may permit air pollution as that term is defined in the act''); *In the Matter of TransAlta Centralia Generation, LLC,* Order on Petition at 7 (April 28, 2011) (SIP provision prohibited ''emissions detrimental to persons or property''); *In the Matter of Hercules, Inc.,* Order on Petition at 8 (November 10, 2004) (SIP provision prohibited emissions that would cause injury or unreasonably interfere with enjoyment of life or use of property).

[74] *See, e.g., In the Matter of Oxbow Calcining LLC,* Order on Petition No. VI–2020–11 at 10–12 (June 14, 2022) (addressing a situation in which a State permitting authority took enforcement action against a source that allegedly caused a violation of a NAAQS on the basis that this alleged violation also violated permit terms reflecting a general SIP provision prohibiting air pollution).

[75] *See, e.g.,* 40 CFR 51.166(w)(10)(v); *ExxonMobil Baytown Chemical Order* 9 at 13–14.

[76] For purposes of this preamble, the terms ''title I permit'' and ''NSR permit'' are used interchangeably to describe a preconstruction permit issued to satisfy the NSR-related requirements of title I of the CAA.

[77] 42 U.S.C. 7470(1), (2), (4).

statutory or regulatory thresholds are subject to ''major source'' NSR requirements. New sources and modifications below the relevant emissions thresholds may be subject to minor NSR requirements or excluded from NSR altogether.

The major NSR program includes two distinct programs that each has unique requirements for new or modified sources. The applicability of these two programs depends on whether the area in which the source is located exceeds the NAAQS for one or more pollutants. The Prevention of Significant Deterioration (PSD) program, based on requirements in part C of title I of the CAA, applies to pollutants for which the area is not exceeding the NAAQS (*i.e.,* areas designated as attainment or unclassifiable) and to regulated NSR pollutants for which there are no NAAQS.[78] The Nonattainment NSR (NNSR) program, based on part D of title I of the CAA, applies to pollutants for which the area is not meeting the NAAQS (*i.e.,* areas designated as nonattainment).[79]

To implement the CAA requirements for these programs, most States have EPA-approved SIPs containing PSD and NNSR preconstruction permitting programs that meet the minimum requirements reflected in the EPA's major NSR program regulations at 40 CFR 51.165 and 51.166. Upon EPA approval of a SIP, the State or local air agency becomes the permitting authority for major NSR permits for sources within its boundaries and issues permits under State law. Currently, State and local air agencies issue the vast majority of major NSR permits. If a State or local air agency does not have an approved NSR program, Federal regulations (40 CFR 52.21, through incorporation into a FIP) apply, and either the EPA issues the major NSR permits or a State or local air agency issues the major NSR permits on behalf of the EPA by way of a delegation agreement. For sources located in Indian Country, the EPA is the permitting authority for major NSR.[80]

The permitting program for construction of new and modified non-major sources and minor modifications to major sources is known as the minor NSR program. In addition to the specific major NSR requirements in CAA sections 165 and 173, CAA section 110(a)(2)(C) requires States to develop a program to regulate the construction and modification of any stationary source ''as necessary to assure that [NAAQS] are achieved.'' [81] The CAA and the EPA's regulations are less prescriptive regarding minimum requirements for minor NSR, so air agencies generally have more flexibility in designing minor NSR programs in their EPA-approved SIPs.[82] Minor NSR permits are almost exclusively issued by State and local air agencies, although the EPA issues minor NSR permits in many areas of Indian Country.[83]

The applicability of the PSD, NNSR, and minor NSR programs to a stationary source must be determined in advance of construction and is a pollutant-specific determination. Thus, a stationary source may be subject to the PSD program for certain pollutants, NNSR for some pollutants, and minor NSR for others.

2. Original Approach to the Title V–NSR Interface (1990–1997)

As noted previously, Congress enacted title V in the 1990 CAA Amendments. The legislative history indicates key committees and legislators intended that, notwithstanding the enactment of title V, NSR permits would continue to be issued as they had for over a decade, and that title V permits would be used to incorporate those requirements but not to alter or impose additional NSR-related requirements.[84] The text and structure of the CAA implicitly reflects this paradigm. However, the statute does not expressly prescribe the details of how the EPA should approach the intersection of the NSR and title V permitting programs.

Thus, when the EPA promulgated the original title V implementing regulations in 1991 and 1992, the Agency sought to provide clarity through multiple regulatory provisions. As noted earlier in this preamble, 40 CFR 70.1(b) states: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While title V does not impose substantive new requirements, it does require that . . . certain procedural measures be adopted especially with respect to compliance.'' Additionally, the EPA created a definition of ''applicable requirement'' in 40 CFR 70.2 (and later, 40 CFR 71.2) that includes, in relevant part: ''all of the following as they apply to emissions units in a part 70 source . . . (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter; (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.''

In the preamble of this initial part 70 rulemaking effort, the EPA spoke directly to the intersection of title V and title I permitting. The EPA did not express an intention to use the title V permitting process to review the substance of applicable requirements established in preconstruction permitting programs under title I of the CAA. To the contrary, the EPA stated that ''[a]ny requirements established during the preconstruction review process also apply to the source for purposes of implementing title V. If the source meets the limits in its NSR permit, the title V operating permit would incorporate these limits *without further review*.'' [85] The EPA stated clearly that ''[t]he intent of title V is *not to second-guess* the results of any State NSR program.'' [86] The EPA stated that ''[d]ecisions made under the NSR and/or PSD programs (*e.g.,* Best Available Control Technology [BACT]) *define applicable SIP requirements* for the title V source and, if they are not otherwise changed, can be incorporated without further review into the operating permit for the source.'' [87] The preamble to the final rule further confirms that ''[d]ecisions made under the NSR and/or PSD programs *define certain applicable SIP requirements* for the title V source.'' [88]

3. Revised Approach to the Title V–NSR Interface (1997–2017)

After State permitting authorities began issuing title V permits in the mid-to-late-1990s, the EPA began receiving public petitions challenging those permits. Some of the earliest title V petitions included challenges to various types of NSR permitting decisions, thereby testing the statements the EPA made when promulgating its part 70 rules. The EPA's approach ultimately differed depending on whether the underlying NSR permit was issued under the EPA's Federal PSD rules (40 CFR 52.21, administration of which was

[78] 42 U.S.C. 7470–79.

[79] 42 U.S.C. 7501–15.

[80] *See* 18 U.S.C. 1151 (defining ''Indian country'').

[81] 42 U.S.C. 7410(a)(2)(C).

[82] *See* 40 CFR 51.160 through 51.164.

[83] *See* 40 CFR 49.151 through 49.165.

[84] See sections III.C.2 and III.C.3 of this preamble for further discussion of legislative intent.

[85] 56 FR 21712, 21738–39 (May 10, 1991) (emphasis added).

[86] *Id.* at 21739 (emphasis added).

[87] *Id.* at 21721 (emphasis added).

[88] 57 FR 32250, 32259 (July 21, 1992) (emphasis added).

delegated to many States at the time) or under EPA-approved SIP rules.

For NSR permits issued under the Federal rules, the EPA's petition responses from 1997 onward followed the Agency's interpretations and statements of intent from the early 1990s. The EPA declined to use the title V petition process to review the merits of NSR permits issued by the EPA or a delegated agency under a FIP. The EPA's reasoning at the time was that appeals of such NSR permits are governed by 40 CFR 124.19 and are heard exclusively through the EPA Environmental Appeals Board (EAB) appeals process. Thus, the EPA concluded that the Agency need not entertain claims that such permits are deficient when raised in a petition to object to a title V permit.[89] The EPA consistently reiterated the same or similar statements in the decades that followed.[90]

However, starting in 1997, the EPA adopted a different approach to title V permitting with respect to NSR permits issued by State permitting authorities under EPA-approved SIP rules.[91] The EPA began to interpret section (1) of the definition of ''applicable requirement'' to allow the EPA, States, and the interested parties to use the title V permitting process to examine the propriety of prior title I permitting decisions. For instance, in the 1997 *Shintech I Order,* the EPA stated:

> Where a state or local government has a SIP-approved PSD program, the merits of PSD issues can be ripe for consideration in a timely petition to object under Title V. Under 40 CFR 70.1(b), ''all sources subject to Title V must have a permit to operate that assures compliance by the source with all applicable requirements.'' Applicable requirements are defined in section 70.2 to include ''(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act . . . .'' The [State] defines ''federal applicable requirement,'' in relevant part, to include ''any standard or other requirement provided for in the Louisiana [SIP] approved or promulgated by EPA through rulemaking under title I of the Clean Air Act that implements the relevant requirements of the Clean Air Act, including any revisions to that plan promulgated in 40 CFR part 52, subpart T.'' Thus, the applicable requirements of the Shintech Permits include the requirement to obtain a PSD permit *that in turn complies with the applicable PSD requirements under the Act,* EPA regulations, and the Louisiana SIP.[92]

In a 1999 letter responding to requests from permitting authorities, the EPA articulated the Agency's then-current understanding of the interaction of title I and title V.[93] The letter stated that ''applicable requirements include the requirement to obtain preconstruction permits that comply with applicable preconstruction review requirements under the Act, EPA regulations, and SIP's [sic].'' The letter expressed the view that CAA section 505(b) provides a form of corrective action in addition to all other enforcement authorities the EPA has under the CAA. The letter stated that the Agency generally will not object to a title V permit for NSR determinations ''made long ago during a prior preconstruction permitting process.'' However, regarding recently issued NSR permits, the EPA indicated it may object to improper NSR determinations. Additionally, the letter said that the EPA could object to a title V permit if the ''EPA believes that an emission unit has not gone through the proper preconstruction permitting process.''

The EPA has also used this reading of the Agency's oversight authority under title V as part of the justification for approving State PSD programs.[94] In these approvals, the EPA pointed to the Agency's authority under title I, sections 113 and 167, but additionally stated that title V ''has added new tools'' for addressing concerns with implementation of PSD requirements by allowing for objection to title V permits under CAA section 505(b). However, the authority to reevaluate an issued preconstruction permit does not appear to have been dispositive to the approval of these PSD programs, as the EPA could still conduct oversight using its title I-based authorities.

The EPA followed this approach in responding to title V petitions between 1997 and 2017. In general, the petition claims at issue alleged two types of defects related to NSR. First, some claims alleged flaws with the terms of major NSR permits issued by a State permitting authority—for example, that BACT limits in a PSD permit were not stringent enough. The EPA refers to these claims as addressing ''NSR permit content.'' Second, other claims alleged that a facility should have received a major NSR permit, instead of a minor NSR permit, to authorize the construction of a new source or modification. The EPA refers to these claims as addressing ''NSR applicability.'' For both types of issues, the EPA indicated that the Agency could review whether preconstruction permitting decisions complied with the requirements of the SIP.

During this time period, the EPA often limited or qualified the Agency's use of title V authorities to address substantive NSR permitting issues. For example, in 1999, the EPA stated:

> In determining BACT under a minor NSR program, as in implementing other aspects of SIP preconstruction review programs, a State exercises considerable discretion. Thus, EPA lacks authority to take corrective action merely because the Agency disagrees with a State's lawful exercise of discretion in making BACT-related determinations. State discretion is bounded, however, by the fundamental requirements of administrative law that agency decisions not be arbitrary or capricious, be beyond statutory authority, or fail to comply with applicable procedures.[95]

Applying this framework, the EPA also drew an analogy between this approach and the standard used by the EAB in reviewing EPA-issued PSD permits, described as a ''clearly erroneous'' standard.[96] More recently,

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[89] *See In the Matter of Maui Electric Co., Ltd.,* Order on Petition (June 16, 1999); *In the Matter of Hawaii Electric Light Co. Ltd.,* Order on Petition (April 3, 1998); *In the Matter of Kawaihae Cogeneration,* Order on Petition (March 10, 1997) (*Kawaihae Order*).

[90] *See, e.g., In the Matter of East Kentucky Power Cooperative, Inc., Hugh L. Spurlock Generating Station,* Order on Petition at 5 n.2 (August 30, 2007) (*Spurlock I Order*); *In the Matter of Carmeuse Lime and Stone,* Order on Petition No. V–2010–1 at 7 n.1 (November 4, 2011); *see also Hu Honua I Order* at 3 n.4.

[91] For example, within the *1997 Kawaihae Order,* in which the EPA declined to review the merits of a PSD permit issued under delegated Federal authority, the Agency also announced the following (without further explanation): ''In contrast, where a state or local government has a SIP-approved PSD program and the [EAB] lacks jurisdiction to entertain PSD permit appeals, the merits of PSD issues are ripe for consideration in a timely veto petition under Title V.'' *Kawaihae Order* at 3.

[92] *Shintech I Order* at 3 n.2 (emphasis added) (citation omitted).

[93] U.S. Environmental Protection Agency. (1999). Letter from John S. Seitz, Director of the EPA Office of Air Quality Planning and Standards, to Robert Hodanbosi, STAPPA/ALAPCO, available at *https://www.epa.gov/sites/production/files/2015-08/documents/hodan7.pdf.*

[94] *See, e.g.,* Approval and Promulgation of Implementation Plans; Oregon, 68 FR 2891, 2899 (January 22, 2003); *see also* Approval and Promulgation of Implementation Plans; Idaho; Designation of Areas for Air Quality Planning Purposes; Idaho, 68 FR 2217, 2221 (January 16, 2003).

[95] *In the Matter of Roosevelt Regional Landfill,* Order on Petition at 9 (May 4, 1999).

[96] *See, e.g., Spurlock I Order* at 4–5 (August 30, 2007) (''The standard of review applied by the EAB in its review of federal PSD permits has been explained in numerous orders of the EAB. In short, in such appeals, the burden is on a petitioner to demonstrate that review is warranted. Ordinarily, a PSD permit will not be reviewed by the EAB unless the decision of the permitting authority was based on either a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review. Thus, when a response to a petition to object to a title V permit requires the Administrator to determine whether an approved state's PSD

the EPA summarized this framework as follows:

Where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of inconsistency with the Act), the burden is on the petitioner to demonstrate to the Administrator that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP. As the EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, such requirements include that the permitting authority: (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. As the permitting authority for [the State's] SIP-approved PSD program, [the State permitting authority] has substantial discretion in issuing PSD permits. Given this discretion, in reviewing a PSD permitting decision in the title V petition context, the EPA generally will not substitute its own judgment for that of [the State]. Rather, consistent with the decision in *Alaska Dep't of Envt'l Conservation* v. *EPA,* 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a state's PSD permitting decision, the EPA generally will look to see whether the petitioner has shown that the state did not comply with its SIP-approved regulations governing PSD permitting, or whether the state's exercise of discretion under such regulations was unreasonable or arbitrary.[97]

Between 1997 and 2017, the EPA occasionally articulated further restrictions on the use of title V oversight tools to address title I permitting issues. For example, on at least three occasions, the EPA indicated that ''the Agency generally does not object to the issuance of a title V permit due to concerns over BACT or related determinations made long ago during a prior preconstruction permitting process.'' [98]

Additionally, on at least one occasion, the EPA suggested that the title V petition demonstration burden may require a final determination that NSR applies before the Agency can use the title V process to overturn an NSR applicability decision made by the permitting authority.[99] The EPA found ''that [the State] has not reached a final determination in this permitting context that PSD is an applicable requirement for these sources, that the USEPA has not determined otherwise, and that a court has not issued a determination in the litigation context. Accordingly, there is no requirement under the facts of this case for the permits to include either PSD limits or a compliance schedule for the source to come into compliance with such limits at this time.'' The EPA concluded that ''even if [the State] were to recognize that the potential for noncompliance [with title I preconstruction permitting requirements] exists, it is not required to pursue inquiries further in the title V context,'' but instead could pursue the matter through title I enforcement mechanisms.

4. Current Approach to the Title V–NSR Interface (2017–Present)

Beginning in 2017, the EPA adopted a more nuanced view that better reflects not only the statute and Congress's intent, but also the EPA's regulatory definition of ''applicable requirement'' and the manner in which the title V permitting program interacts with other types of CAA requirements. As with many of the EPA's views on this topic, the Agency's updated view was articulated within Administrator-signed orders responding to title V petitions on individual title V permits.

The first such order was the 2017 *PacifiCorp-Hunter I Order.*[100] There, the EPA interpreted the CAA and the EPA's title V regulations not to require permitting authorities (including the EPA) to examine the merits of certain title I permitting decisions in the title V permitting context. Specifically, in response to a petition claiming that a PSD permit (instead of a minor NSR permit) was required for certain changes that occurred at the facility at issue approximately 20 years prior, the EPA explained:

In circumstances such as those present here where a preconstruction permit has been duly obtained, . . . when a permitting authority has made a source-specific permitting decision with respect to a particular construction project under title I, those decisions ''define certain applicable SIP requirements for the title V source'' for purposes of title V permitting. 57 FR 32250, 32259 (July 21, 1992). The EPA is now interpreting the regulations to mean that the issuance of a[n NSR] permit defines the applicability of preconstruction requirements under section (1) of the definition of ''applicable requirement'' for the approved construction activities for the purposes of permitting under title V of the Act. These source-specific permitting actions take the general preconstruction permitting requirements of the SIP—the requirement to obtain a particular type of permit and the substantive requirements that must be included in each type of permit—and evaluate at the time of the permitting decision whether and how to apply them to a proposed construction or modification.[101]

Further, the EPA stated:

Consistent with this reading, permitting agencies and the EPA need not reevaluate—in the context of title V permitting, oversight, or petition responses—previously issued final preconstruction permits, especially those that have already been subject to public notice and comment and an opportunity for judicial review. Concerns with these final preconstruction permits should instead be handled under the authorities found in title I of the Act. Where a final preconstruction permit has been issued, whether it is a major or minor NSR permit, the terms and conditions of that permit should be incorporated as ''applicable requirements'' and the permitting authority and the EPA should limit its review to whether the title V permit has accurately incorporated those terms and conditions and whether the title V permit includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit.[102]

Shortly after issuing the *PacifiCorp-Hunter I Order,* the EPA issued the *Big River Steel Order,*[103] which applied similar statutory and regulatory interpretations to a different circumstance. In the *Big River Steel Order,* the EPA declined to use the title V petition process to review whether a PSD permit satisfied the relevant SIP

permitting decision was adequately explained and meets the requirements of its SIP, EPA believes it is appropriate to apply a similar standard of review to that employed by the EAB in its review of federal PSD permits. When EPA promulgated the regulations governing the EAB's exercise of its review authority, the Agency noted that the power of review 'should be only sparingly exercised.' Similar deference to the permitting authority is also justified in the case of a PSD permit issued by a state with an approved PSD program, as is the case here.'' (quoting 45 FR 33290, 33412 (May 19, 1980); citing *In re Prairie State Generating Company,* 13 E.A.D. 1 (EAB 2006); *In re Kawaihae Cogeneration,* 7 E.A.D. 107 (EAB 1997))).

[97] *In the Matter of Appleton Coated, LLC,* Order on Petition Nos. V–2013–12 & V–2013–15 at 5 (October 14, 2016) (*Appleton Order*) (citations omitted).

[98] *In the Matter of Georgia Pacific Consumer Products LP Plant,* Order on Petition No. V–2011–1 at 17 (July 23, 2012); *Spurlock I Order* at 19; *see In the Matter of Chevron Products Company, Richmond, California Facility,* Order on Petition No. IX–2004–08 at 9 (March 15, 2005). Note that this statement is based on the EPA policy articulated in the 1999 letter discussed in footnote 93.

[99] *In the Matter of Midwest Generation-Joliet Generating Station and Will County Generating Stations,* Order on Petition No. V–2005–2 at 9–10 (June 14, 2007).

[100] *In the Matter of PacifiCorp Energy, Hunter Power Plant,* Order on Petition No. VIII–2016–4 (October 16, 2017).

[101] *PacifiCorp-Hunter I Order* at 10–11. As the EPA explained: ''This interpretation applies to the facts of this Claim, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available.'' *Id.* at 11 n.21.

[102] *Id.* at 19 (citing 42 U.S.C. 7661c(a); 40 CFR 70.6(a)(3), 70.6(c)(1)).

[103] *In the Matter of Big River Steel, LLC,* Order on Petition No. VI–2013–10 (October 31, 2017).

requirements governing PSD permit content (including BACT) and modeling related to the NAAQS. The EPA did so notwithstanding the fact that the PSD permit at issue, and the title V permit being petitioned, were issued at the same time and in the same physical permit document.

Since the 2017 *PacifiCorp-Hunter I* and *Big River Steel Orders,* the EPA has issued approximately 30 other title V petition orders addressing similar issues under different fact patterns, as discussed in the following paragraphs. Although the EPA has largely followed the overarching interpretations and policies articulated in the *PacifiCorp-Hunter I* and *Big River Steel Orders,*[104] each decision about whether those interpretations were applicable depended on the specific facts at issue.[105] Through these case-by-case decisions, the EPA has clarified various aspects of the Agency's interpretation of the title V provisions. However, because those decisions are spread across many different orders, the EPA understands that not all stakeholders, including permitting authorities, permittees, and members of the public, may fully understand the Agency's views about which types of issues are, or are not, subject to review through title V. This apparent misunderstanding has persisted, notwithstanding the EPA's attempt to explain the Agency's views in the preamble to the January 2024 Proposed Rule.[106] Thus, the EPA seeks to clarify its position by providing a summary below of the most relevant aspects of these prior decisions.

In most of these decisions, the EPA concluded that NSR permitting actions established the relevant ''applicable requirements'' for title V purposes, and the Agency declined to review the substance of those applicable requirements in the title V petition context. The EPA applied this approach to many different types of issues, including the sufficiency of major NSR permit terms,[107] the sufficiency of minor NSR permit terms,[108] issues related to modeling and the NAAQS,[109] procedures used to issue NSR permits,[110] whether major NSR is applicable,[111] and other NSR-related issues.[112] Some of these orders involved situations in which NSR permits were issued well before the title V permits being challenged,[113] while others involved more contemporaneous NSR and title V permitting decisions.[114]

In other orders with materially different factual underpinnings, the EPA determined that it was appropriate to review certain NSR-related issues through the title V permitting process. For example, the EPA substantively engaged with title V petition claims concerning the sufficiency of monitoring established in NSR permits,[115] requirements involving an explicit overlap between NSR and title V,[116] and other questions about whether a title V permit assured compliance with the NSR-related requirements of the SIP for which no underlying NSR permit was issued [117] or for which the underlying NSR permit did not involve public notice and the opportunity for comment.[118]

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[104] As discussed later in this preamble, in response to a 2020 decision by the U.S. Court of Appeals for the Tenth Circuit, the EPA has not applied this approach in title V petition orders regarding facilities located within the jurisdiction of the Tenth Circuit in certain circumstances and, therefore, has not fully achieved national uniformity in this respect.

[105] *See, e.g., PacifiCorp-Hunter I Order* at 11 n.21 (''This interpretation applies to the facts of this Claim, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available. The EPA is not considering at this time whether other circumstances may warrant a different approach.''); *Sierra Club* v. *EPA,* 926 F.3d 844, 850 (D.C. Cir. 2019) (emphasizing the case-specific nature of the EPA's decision to apply the interpretation at issue in the *PacifiCorp-Hunter I Order,* as well as the case-specific nature of any future EPA decisions to apply or not apply the same interpretation to different fact patterns).

[106] In recent permitting decisions and title V petitions, the EPA has observed that both State permitting authorities and public petitioners have often misapplied, misinterpreted, or ignored the interpretations and policies expressed in these orders and in the January 2024 Proposed Rule.

[107] *In the Matter of Torrance Refining Company, LLC,* Order on Petition No. IX–2024–13 at 49–60 (January 7, 2025) (*Torrance Order*); *In the Matter of Nucor Steel Louisiana, LLC, Direct Reduced Iron Facility,* Order on Petition No. VI–2023–17 at 19–20, 21 (September 27, 2024) (*Nucor Convent Order*); *In the Matter of Commonwealth LNG, LLC,* Order on Petition No. VI–2023–7 at 12–14 (January 30, 2024) (*Commonwealth Order*); *AK Steel Order* at 9–13; *In the Matter of Riverview Energy Corp.,* Order on Petition No. V–2019–10 at 19–29 (March 26, 2020) (*Riverview Order*); *In the Matter of South Louisiana Methanol, LP, St. James Methanol Plant,* Order on Petition Nos. VI–2016–24 & VI–2017–014 at 8–10 (May 29, 2018) (*South Louisiana Methanol Order*); *Big River Steel Order* at 8–20.

[108] *In the Matter of Delaware City Refining Company, LLC, Delaware City Refinery,* Order on Petition No. III–2022–10 at 26 (July 5, 2023) (*Delaware City Refinery Order*); *Valero Houston Order* at 65–66; *In the Matters of Superior Silica Sands & Wisconsin Proppants, LLC,* Order on Petition Nos. V–2016–18 & V–2017–2 at 14–15 (February 26, 2018) (*SSS/WP Order*); *In the Matter of Tennessee Valley Authority, Gallatin Fossil Plant,* Order on Petition Nos. IV–2016–11 & IV–2017–17 at 19–20 (January 30, 2018) (*TVA Gallatin II Order*).

[109] *In the Matter of Arizona Electric Power Cooperative Inc., Apache Generating Station,* Order on Petition No. X–2024–21 at 22–24 (September 16, 2025) (*Apache Order*); *Nucor Convent Order* at 19–20, 22; *In the Matter of Salt River Project Agricultural Improvement and Power District, Coolidge Generating Station,* Order on Petition No. IX–2024–7 at 25, 31 (September 11, 2024) (*SRP Coolidge Order*); *Commonwealth Order* at 12–14; *Riverview Order* at 19–21; *Big River Steel Order* at 8–20.

[110] *Century Aluminum Order* at 19–20; *AK Steel Order* at 9–13.

[111] *In the Matter of Humboldt Redwood Company, LLC,* Order on Petition No. IX–2025–1 at 10–12 (May 5, 2026) (*Humboldt Order*); *Apache Order* at 20; *In the Matter of South32 Hermosa Inc.,* Order on Petition No. IX–2024–20 at 9–11 (May 30, 2025) (*South32 Hermosa Order*); *SRP Coolidge Order* at 11–14, 22–23; *In the Matter of Intercontinental Terminals Co. LLC, Pasadena Terminal,* Order on Petition No. VI–2024–13 at 21–23, 25–26 (February 7, 2024) (*ITC Pasadena Order*); *In the Matter of Waelz Sustainable Products, LLC,* Order on Petition No. V–2021–10 at 9–16 (March 14, 2023) (*Waelz Order*); *In the Matter of Yuhuang Chemical Inc. Methanol Plant,* Order on Petition Nos. VI–2017–5 & VI–2017–13 at 7–8 (April 2, 2018) (*Yuhuang II Order*); *In the Matter of ExxonMobil Corp., Baytown Olefins Plant,* Order on Petition No. VI–2016–12 at 9–12 (*ExxonMobil Baytown Olefins Order*); *PacifiCorp-Hunter I Order* at 8–20.

[112] *In the Matter of ExxonMobil Corp., Baytown Refinery,* Order on Petition No. VI–2016–14 at 12–13 (*ExxonMobil Baytown Refinery Order*); *ExxonMobil Baytown Olefins Order* at 9–12.

[113] *Torrance Order* at 51; *ITC Pasadena Order* at 21–23; *Delaware City Refinery Order* at 16; *Valero Houston Order* at 65–66; *ExxonMobil Baytown Refinery Order* at 12–13, *ExxonMobil Baytown Olefins Order* at 9–12; *TVA Gallatin II Order* at 19–20.

[114] *Humboldt Order* at 10–12; *Apache Order* at 22–24; *South32 Hermosa Order* at 10–11; *Nucor Convent Order* at 20; *SRP Coolidge Order* at 12–14; *Commonwealth Order* at 13–14; *Waelz Order* at 13–15; *Riverview Order* at 24–28; *South Louisiana Methanol Order* at 9; *Yuhuang II Order* at 7–8; *SSS/WP Order* at 14–15; *Big River Steel Order* at 8–20.

[115] *ITC Pasadena Order* at 13–14; *In the Matter of Gulf Coast Growth Ventures, LLC, Olefins, Derivative, & Utilities Plant,* Order on Petition No. VI–2021–3 at 17–19 (May 12, 2022) (*Gulf Coast Growth Ventures Order*); *ExxonMobil Baytown Chemical Order* at 20–21; *South Louisiana Methanol Order* at 10–11; *Yuhuang II Order* at 8; *see also, e.g., Big River Steel Order* at 17, 17 n.30, 19 n.32, 20; *PacifiCorp-Hunter I Order* at 16, 17, 18, 18 n.33, 19.

[116] *In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 1 (West) & Plant 3 (Asphalt Unit),* Order on Petition No. VIII–2024–18 at 29–30 (December 30, 2024) (*Suncor West II Order*); *In the Matter of HighPoint Operating Corporation, Anschutz Equus Farms 4–62–28,* Order on Petition No. VIII–2024–6 at 15–16 (July 31, 2004) (*HighPoint Order*); *In the Matter of DCP Operating Company LP, Platteville Natural Gas Processing Plant,* Order on Petition No. VIII–2023–14 at 15–16 (April 2, 2024) (*DCP Platteville I Order*); *In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 2 (East),* Order on Petition Nos. VIII–2022–13 & VIII–2022–14 at 53–54 (July 31, 2023) (*Suncor East Order*); *ExxonMobil Baytown Chemical Order* at 13–14; *In the Matter of Coyote Station Power Plant,* Order on Petition Nos. VIII–2019–1 & VIII–2020–8 at 12–13 (January 15, 202) (*Coyote Station Order*).

[117] *Suncor West II Order* at 29–30; *West Elk Order* at 13 n.17; *Suncor East Order* at 45–48, 54–55; *SRP Agua Fria I Order* at 11 n.18; *In the Matter of Salt River Project Agricultural Improvement & Power District, Desert Basin Generating Station,* Order on Petition No. IX–2022–3 at 12 n.20 (July 28, 2022) (*SRP Desert Basin Order*); *In the Matter of BP Products North America, Inc., Whiting Business Unit,* Order on Petition No. V–2021–9 at 13 n.24 (March 4, 2022) (*BP Whiting II Order*).

[118] *In the Matter of TPC Group LLC, Houston Plant,* Order on Petition Nos. VI–2025–2 & VI–2025–3 at 43 n.243 (May 6, 2026) (*TPC Houston Order*); *ITC Pasadena Order* at 24–25; *Coyote Station Order* at 12.

Two of the EPA's petition orders, the *PacifiCorp Hunter I Order* and the *ExxonMobil Baytown Olefins Order,* were challenged in different Federal circuit courts of appeal, which issued decisions the same year. The U.S. Court of Appeals for the Fifth Circuit upheld the *ExxonMobil Baytown Olefins Order.*[119] There, the Fifth Circuit found persuasive and upheld the ''EPA's view that Title V permitting is not the appropriate vehicle for reexamining the substantive validity of underlying Title I preconstruction permits.'' [120] The Fifth Circuit's conclusion did not turn on application of *Chevron* deference and was instead ''based principally on Title V's text, Title V's structure and purpose, and the structure of the Act as a whole.'' [121]

The U.S. Court of Appeals for the Tenth Circuit issued a ruling vacating and remanding the *PacifiCorp-Hunter I Order.*[122] Unlike the Fifth Circuit, the Tenth Circuit did not address the EPA's statutory interpretation but instead rejected the Agency's reasoning as inconsistent with the Agency's regulations.[123] According to the Tenth Circuit, the EPA's regulations require that title V permits ensure compliance with all ''applicable requirements,'' which the Tenth Circuit interpreted to include all requirements in the SIP, including those related to major NSR.[124]

Because these two courts ruled on different grounds (with the Fifth Circuit focusing on the statute and the Tenth Circuit focusing on the EPA's existing regulations), the legal reasoning underlying their holdings is not in direct conflict. However, in practice, the differing rulings have made it difficult for the EPA to apply a uniform interpretation of the Agency's current title V regulations nationwide.

Within the Tenth Circuit's jurisdiction, in the EPA's subsequent responses to petitions on the PacifiCorp-Hunter permit (*PacifiCorp-Hunter II* [125] and *PacifiCorp-Hunter III* [126]), the Agency reviewed whether a source should have obtained a major NSR permit for projects previously authorized by a minor NSR permit. These reviews were intended to avoid conflict with the Tenth Circuit's decision on the *PacifiCorp-Hunter I Order.*

In title V petition orders regarding permits issued by States outside of the Tenth Circuit, however, the EPA maintained its post-2017 approach. As the EPA explained:

> EPA continues to believe that the interpretation of the CAA upheld by the Fifth Circuit's decision in *Environmental Integrity Project* v. *EPA,* 969 F.3d 529 (5th Cir. 2020), is correct. EPA thus intends, where supported by the facts of individual permits, to continue to apply the reasoning of *In re Big River Steel, LLC,* Order on Petition No. VI–2013–10 (October 31, 2017), when issuing and reviewing title V permits and reviewing petitions on permits for sources in states outside of the Tenth Circuit. That is, where EPA has approved a state's title I permitting program, duly issued preconstruction permits establish the NSR-related ''applicable requirements'' for the purposes of title V. As with ''applicable requirements'' established through other CAA authorities, the terms and conditions of those permits should be incorporated into a source's title V permit without a further round of substantive review as part of the title V process.[127]

Thus, when reviewing permits issued by permitting authorities in States outside the Tenth Circuit's jurisdiction, the EPA continued to apply the Agency's post-2017 approach and generally declined to use the title V process to review the substance of NSR permitting decisions. In the rare situations outside the Tenth Circuit in which the EPA decided that it was appropriate to use the title V process to review certain NSR issues, these decisions were not based on the Tenth Circuit's interpretation of the Agency's regulations, but rather on unusual factual circumstances that, in the Agency's view at the time, provided a basis for reviewing such issues under the EPA's post-2017 interpretation of the regulations.[128]

The EPA maintained that the *Big River Steel Order* and subsequent title V orders reflect the best interpretation not only of the relevant statutory provisions, but also of the existing regulations. Nonetheless, in light of the differing circuit court decisions, the EPA considers it prudent to update the Agency's regulations to clarify the Agency's interpretation of the statute. Thus, on January 9, 2024, the EPA proposed regulatory amendments to the definition of ''applicable requirements.'' [129] The proposed regulatory amendments were designed to allow the EPA to apply a single framework across the Nation by revising the regulatory language that the Tenth Circuit found to be in conflict with the Agency's current interpretation. The January 2024 Proposed Rule was also designed to more clearly align the EPA's regulations with the Agency's statutory interpretation endorsed by the Fifth Circuit. After considering public comments on the January 2024 Proposed Rule, the EPA is taking final action on the proposed regulatory text to codify the approach that the Agency has applied since 2017, which will now apply nationwide.[130]

B. Summary of the EPA's Approach and Final Action

The EPA is finalizing amendments to the Agency's regulations to clarify the Agency's approach to the intersection between title I permitting and title V permitting. In sum: provided that a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, such NSR permit establishes all NSR-related ''applicable requirements'' of the SIP (or FIP) that are applicable to the construction of the new source or modification authorized by the permit for purposes of title V. As with ''applicable requirements'' established under other CAA authorities (*e.g.,* NSPS, NESHAP), the EPA will not

[119] *Env't Integrity Project* v. *EPA,* 969 F.3d 529 (5th Cir. 2020).

[120] *Id.* at 546.

[121] *Id.* at 541. The Fifth Circuit stated its conclusion several ways, as the following examples illustrate: ''Concluding EPA's interpretation of the Title V program is independently persuasive and therefore entitled to the mild form of deference recognized by *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944), we deny the petition.'' 969 F.3d at 535. ''[W]e find [the EPA's] reasoning persuasive as a construction of the relevant provisions of Title V.'' *Id.* at 540. ''Applying *Skidmore,* we ask whether EPA's interpretation of Title V in the *Hunter* Order is persuasive. Specifically, we inquire into the persuasiveness of EPA's current view that the Title V permitting process does not require substantive reevaluation of the underlying Title I preconstruction permits applicable to a pollution source. As we read it, the *Hunter* Order defends the agency's interpretation based principally on Title V's text, Title V's structure and purpose, and the structure of the Act as a whole. Having examined these reasons and found them persuasive, we conclude that EPA's current approach to Title V merits *Skidmore* deference.''

[122] *Sierra Club* v. *EPA,* 964 F.3d 882 (10th Cir. 2020).

[123] *Id.* at 897.

[124] *Id.* at 885–86, 890–91.

[125] *In the Matter of PacifiCorp Energy, Hunter Power Plant,* Order on Petition Nos. VIII–2016–4 & VIII–2020–10 (January 13, 2021).

[126] *In the Matter of PacifiCorp Energy, Hunter Power Plant,* Order on Petition No. VIII–2022–2 (September. 27, 2022).

[127] *PacifiCorp-Hunter III Order* at 16 n.29; *see also PacifiCorp-Hunter II Order* at 15 n.26.

[128] *TPC Houston Order* at 42 n.243; *ITC Pasadena Order* at 13–14, 24–25; *SRP Agua Fria I Order* at 11 n.18; *SRP Desert Basin Order* at 12 n.20; *Gulf Coast Growth Ventures Order* at 17 n.28; *ExxonMobil Baytown Chemical Order* at 14 n.27; *BP Whiting II Order* at 13 n.24; *Coyote Station Order* at 12.

[129] 89 FR 1150 (January 9, 2024).

[130] Some public commenters on the January 2024 Proposed Rule—in particular, permitting agencies and regulated entities operating within the boundaries of the Fifth Circuit's jurisdiction—suggested that this rulemaking is not necessary. However, as other commenters recognized, the EPA considers this rulemaking necessary to provide clarity and uniformity across the Nation.

reevaluate those NSR decisions through the title V process.

The EPA is updating paragraphs (1) and (2) of the definition of ''applicable requirement'' in 40 CFR 70.2 and 71.2. Paragraph (1) of this definition addresses SIP (and FIP) requirements more generally. This final rule adds text to paragraph (1) to clarify that, for purposes of title V, if an NSR permit is issued under an EPA-approved or EPA-promulgated title I program (*i.e.,* SIP or FIP), with public notice and the opportunity for comment and judicial review, the terms and conditions of that preconstruction permit define the NSR-related applicable requirements of the SIP or FIP that apply to the activities authorized by such a preconstruction permit.

This rule also adds text to paragraph (2) of the definition of ''applicable requirement'' in 40 CFR 70.2 and 71.2 to clarify that, for purposes of title V, the relevant terms and conditions of all types of NSR permits issued under a SIP or FIP, including minor NSR permits, are applicable requirements that must be included in a title V permit, regardless of whether the procedures referenced in paragraph (1) are followed.

In the January 2024 Proposed Rule, the EPA requested comment on any other changes to the regulatory text that would be necessary to fully effectuate the Agency's existing and proposed approach. Several commenters provided helpful suggestions intended to make the EPA's approach even clearer in the part 70 regulations. In response to some of those comments, the EPA is finalizing changes to 40 CFR 70.8 and 70.12 to clarify that potential or alleged defects in an applicable requirement established outside of the title V process do not present a basis for the EPA's objection to a title V permit. This principle has been an implicit, and generally well-understood, element of the title V program throughout the program's existence, and one that was repeatedly emphasized in the January 2024 Proposed Rule.[131] Nonetheless, the EPA agrees with commenters that the Agency's regulations should be updated to more explicitly clarify this longstanding principle.

C. Rationale for the EPA's Approach and Final Action

This subsection of the preamble explains the overarching legal and policy basis for the EPA's approach and addresses comments that either supported or opposed the Agency's approach. The next subsection of the preamble (III.D) addresses more specific issues about how this approach functions in various fact patterns.

As explained in the following subsections, title V of the CAA does not compel the EPA to use the title V operating permit process to review the substance of decisions made during the title I (NSR) preconstruction permitting process. The statute requires that title V permits assure compliance with ''applicable requirements'' of the CAA, but the statute does not define this term or expressly provide that permitting authorities must or may reevaluate NSR permitting decisions. The best reading of the relevant statutory provisions is that the terms and conditions of an NSR permit issued under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, define the relevant NSR-related applicable requirements of the SIP (or FIP) for purposes of title V permitting.

The EPA's interpretation is supported by the structure and purpose of title V. Congress designed title V to consolidate, assure compliance with, and improve the enforceability of applicable requirements established under other CAA programs. The title V program was not intended to create new substantive requirements or modify substantive requirements added in those other programs (other than to include supplemental compliance assurance measures, if necessary). Nor was it intended to create a second round of review for already established applicable requirements that introduce additional burdens and delays for permitting authorities and permitted sources. This understanding of the purpose of title V—both in general and as it relates to the intersection of title V and NSR permitting—is reflected in the statute, regulations, legislative history, EPA statements contemporaneous with the promulgation of the initial title V regulations, and various Federal court decisions and EPA statements since that time.

The EPA's interpretation is also consistent with the structure of the CAA as a whole. The EPA's approach gives weight to the title I mechanisms that Congress provided to establish the specific NSR-related requirements of SIPs, as well as the title I and title III procedures for evaluating, challenging, and enforcing title I permitting requirements. It also respects the system of cooperative federalism reflected in the NSR and title V permitting programs.

The EPA's approach also reflects better policy than alternative approaches because it ensures that applicable requirements established in different CAA programs are treated consistently in title V permitting, accounts for the limitations associated with title V oversight tools, emphasizes title I avenues of review, and respects the finality of, and fosters certainty in, title I permitting decisions.

1. Best Reading of the Statutory Text

The text of title V alone does not conclusively define the scope of issues subject to review (or re-review) during the title V permitting process. In relevant part, CAA section 504(a) requires that title V permits ''include enforceable emissions limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter [*i.e.,* the CAA], including the requirements of the applicable implementation plan [*i.e.,* the SIP or FIP].'' [132] Similarly, CAA section 505(b) requires that if the EPA determines that a title V permit is ''not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan,'' the EPA must object to the permit, and if the EPA does not, any person may petition the EPA to do so.[133] Similar references to ''applicable requirements'' and ''requirements of the applicable implementation plan'' appear in other parts of title V.[134]

However, the term ''applicable requirements'' is not defined in the CAA, and the statute does not otherwise specify the role of the title V permitting process in determining the applicable requirements of the CAA or the requirements of an applicable implementation plan for a particular source or construction activity. Instead,

[131] *See, e.g.,* 89 FR 1150 at 1175 and 1176. See section III.C.2 of this preamble for further discussion.

[132] 42 U.S.C. 7661c(a).

[133] 42 U.S.C. 7661d(b)(1)–(2).

[134] For example: ''The term 'schedule of compliance' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.'' 42 U.S.C. 7661(3). ''Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.'' 42 U.S.C. 7661a(a). The regulations to implement the program shall include a ''requirement that the applicant submit with the application a compliance plan describing how the source will comply with all applicable requirements under this chapter.'' 42 U.S.C. 7661b(b). Like CAA section 504, these sections do not specify the scope of the term ''applicable requirements'' or how the permitting authority or the EPA is to determine what the applicable requirements are for an individual source as part of its title V permit.

Congress delegated to the EPA the discretion to fill in these details consistent with the text of the relevant provisions and the structure of the statute as a whole.

Specifically, CAA section 502(b) instructs the Administrator to promulgate regulations ''establishing the minimum elements of a permit program to be administered by any air pollution control agency,'' including a requirement at CAA section 502(b)(5)(A) that the permitting authority have adequate authority to ''issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter.'' [135] Under CAA section 505(b)(2), which governs objections by the EPA and petitions to the Administrator, also instructs the Administrator to promulgate regulations that implement the petition provisions within that paragraph.[136] This includes the requirement that the Administrator object if a petitioner demonstrates that a permit is not in compliance with ''the requirements of this chapter, including the applicable implementation plan.'' [137]

Given the instruction from Congress for the EPA to promulgate regulations about the title V permit program and the title V petition process, the EPA finds it necessary and appropriate to ''fill up the details'' of title V of the CAA through regulations,[138] including determining what constitutes ''applicable requirements'' and ''the requirements of the applicable implementation plan.'' As detailed below, these regulations represent the best reading of the relevant provisions and the structure of the statute. The EPA is exercising discretion to codify the best reading of the statute in the regulations to promote clarity, national consistency, and understanding on the part of the public and the regulated community.

With respect to title I preconstruction permits, the statutory terms ''applicable requirements'' and ''requirements of the applicable implementation plan'' are particularly ambiguous and require further interpretation. As explained in section III.C.3.a of this preamble, during the preconstruction permitting process, permitting authorities determine which NSR requirements in the SIP (or FIP) are applicable (*e.g.,* major NSR or minor NSR requirements) to new or modified sources, and derive the specific permit conditions (*e.g.,* emission limitations and other standards) applicable to a given source or modification based on the general direction in the SIP. In many situations, the public has the opportunity to provide comments on draft permits and to seek review in State court. At the end of this NSR permitting process, the NSR permit terms reflect the NSR-related requirements of the SIP (or FIP) applicable to the new or modified source.

The key inquiry is whether the title V permitting process should or may be used to double-check—and re-check during every subsequent title V renewal permit—the substantive adequacy of applicable requirements established through NSR permitting decisions. In other words, the question is whether title V should or may be used to assess whether the requirements embodied in an NSR permit were properly derived from the general, overarching SIP (or FIP) provisions governing NSR.

Title V of the CAA contains no language expressly mandating such a reevaluation through title V. Notably, the Fifth Circuit found the CAA's silence on this topic a persuasive reason for upholding the EPA's statutory interpretation that is the basis for this rule.[139] The statute's silence on this topic stands in contrast to the presence of more specific statutory mandates, such as the requirement that title V permits be used to add compliance assurance measures like monitoring, recordkeeping, and reporting requirements.[140]

Moreover, the CAA's references to ''applicable requirements'' and ''the requirements of the applicable implementation plan'' do not compel such a reevaluation notwithstanding the text and structure of the title I NSR provisions. Notably, the Fifth Circuit rejected the notion that the general term ''applicable requirements'' should be construed as ''broad and sweeping,'' or that this term should be read to mandate using title V to review whether requirements in an NSR permit accurately reflect the requirements of a SIP.[141]

In this action, the EPA is adopting the best reading of the statutory terms ''applicable requirements'' and ''requirements of the applicable implementation plan'' in CAA sections 504(a) and 505(b) in the context of title I NSR permits issued under a SIP or FIP.[142] The best reading is that the terms and conditions of an NSR permit issued under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, define the relevant set of ''applicable requirements'' of the SIP or FIP for purposes of title V permitting. That is, the ''requirements of an applicable implementation plan'' relevant to a particular construction project are the requirements that the permitting authority determined to be applicable during the NSR permitting process, as reflected in the terms of such an NSR permit. The EPA also considers this interpretation to be the best reading of the statutory text in light of the structure and purpose of title V, the legislative history of title V, the structure of the CAA as a whole, and other policy reasons derived from the purposes of the statute generally and title V specifically, as explained in the following subsections of this preamble.

Public comments from permitting authorities and regulated entities generally agreed that the EPA's interpretation reflects the best reading of the relevant statutory text, and these commenters supported or echoed EPA's views regarding the structure and purpose of title V, the legislative history of title V, the structure of the CAA as a whole, and other policy reasons

[135] 42 U.S.C. 7661a(b)(5)(A).

[136] 42 U.S.C. 7661d(b)(2).

[137] *Id.*

[138] *Loper Bright Enters.* v. *Raimondo,* 603 U.S. 369, 395 (2024) (quoting *Wayman* v. *Southard,* 10 Wheat. 1, 43 (1825)).

[139] *Env't Integrity Project,* 969 F.3d at 541–42. Specifically, the court stated the following: ''We find persuasive EPA's position that Title V lacks a specific textual mandate requiring the agency to revisit the Title I adequacy of preconstruction permits. Our own review of Title V confirms that it contains no such explicit requirement, nor any language guiding the agency on how to perform a review of that nature. The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it. A number of cases have identified the *casus omissus pro omisso habendus est* canon, under which a statute should not be read to include matter it does not include. Here, Title V does not tell EPA to reconsider [NSR] in the course of Title V permitting. We reject Petitioners' position because there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'' *Id.* at 541–42 (cleaned up) (citing *Lamie* v. *U.S. Tr.,* 540 U.S. 526, 538 (2004); *Iselin* v. *United States,* 270 U.S. 245, 251 (1926); *Yates* v. *Collier,* 868 F.3d 354, 369 (5th Cir. 2017); *In re Miller,* 570 F.3d 633, 638–39 (5th Cir. 2009)).

[140] 42 U.S.C. 7661c(c); *see* 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d at 680.

[141] *See Env't Integrity Project,* 969 F.3d at 543 (''[Petitioners] would effectively rewrite the clause to read: 'a *de novo* reconsideration of the source's preconstruction permitting.' Surely, Congress would not have hidden that regulatory elephant in this residual mousehole.'').

[142] *See Loper Bright Enters.* v. *Raimondo,* 603 U.S. 369 (2024). As discussed in the January 2024 Proposed Rule, the EPA considers the Agency's longstanding prior regulations to be consistent with this statutory interpretation. However, in light of the Tenth Circuit's ruling (which held that the EPA's prior regulatory definition of ''applicable requirement'' precluded the Agency's approach in a particular situation), the EPA is amending the Agency's regulations to more clearly reflect the Agency's statutory interpretation. For further discussion of the EPA's interpretation of the Agency's prior regulations, see *Big River Steel Order* at 9–11.

discussed in the following sections of this preamble.[143] Public comments from environmental and public interest groups generally opposed—but did not specifically rebut—the EPA's overall statutory interpretation.[144]

2. Structure and Purpose of Title V

The EPA's interpretation of ''applicable requirements'' in the context of title V and NSR permitting is supported by the structure and purpose of the title V program—namely to consolidate, assure compliance with, and improve the enforceability of applicable requirements established under other CAA programs. The title V program was not intended to establish new substantive requirements or modify substantive requirements created in other programs (other than to include supplemental compliance assurance measures, when necessary), nor was it intended to add the further burdens and delays associated with a re-review of already established applicable requirements. This purpose is reflected in the statute, regulations, legislative history associated with Congress's enactment of title V, EPA statements contemporaneous with the promulgation of the initial title V regulations, and various Federal court decisions and EPA statements since that time.

As introduced in section III.B of this preamble, a core purpose and function of title V is to identify, consolidate, and assure compliance with the requirements applicable to individual sources from other, more substantive CAA programs. This function is embodied primarily within CAA section 504 and 40 CFR 70.6(a) and (c), which generally require that title V permits include conditions that assure an individual source's compliance with all CAA applicable requirements.

When Congress enacted title V in 1990, it explained this purpose as follows:

> The first benefit of the title V permit program is that . . . it will clarify and make more readily enforceable a source's pollution control requirements. Currently, in many cases, the source's pollution control obligations . . . are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations. . . . The air permit program will ensure that all of a source's obligations . . . will be contained in one permit document.[145]

In addition to identifying and consolidating existing requirements applicable to a source, CAA section 504 provides the authority to use title V permits to establish additional requirements relating to compliance assurance. For example, title V permits may be used to create or supplement monitoring requirements when necessary to assure an individual source's compliance with underlying applicable requirements that do not themselves contain sufficient monitoring provisions.[146] Where Congress intended title V to serve as a vehicle for the reevaluation of existing requirements or for imposing new requirements, it expressly said so.

Beyond title V's consolidation and compliance assurance functions, title V generally does not impose new pollution control requirements on sources or provide a vehicle to modify such requirements established under other CAA programs. As stated in the congressional record:

> The permit provisions of title V provide a focus for this harmonization [of other titles of the CAA], although *title V does not change, and gives EPA no authority to modify, the substantive provisions of these other titles.* . . . Title V creates no new substantive emission control requirements. Nothing in the permitting title should be read to increase the stringency of any control requirement nor to delay or accelerate the effectiveness of such requirements, except as expressly provided in titles I, III, and IV.[147]

Recognizing the core functions of the title V program, the EPA's regulations have provided since 1992: ''All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While *title V does not impose substantive new requirements,* it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance.'' [148] These principles are further explained in EPA statements contemporaneous with the initial 1992 title V regulations,[149] subsequent rulemakings,[150] and in numerous orders

[143] See section 3.1 of the RTC. To the extent comments from permitting authorities and regulated entities opposed the EPA's statutory interpretation, such opposition was generally limited to a particular element of this interpretation: that an NSR permit must undergo public notice and the opportunity for comment and judicial review before it could be said to conclusively establish the ''applicable requirements'' of the SIP for purposes of title V. That specific topic is discussed further in section III.D.5 of this preamble and section 3.5.7 of the RTC.

[144] To the extent adverse public comments raised specific arguments or rebuttals regarding the relevant statutory text, nearly all of those arguments were related to a specific type of question (as opposed to the EPA's overarching framework): should title V be used to review questions about whether major NSR requirements should be applicable to a particular construction activity at a stationary source? That specific topic is discussed further is section III.D.3.b of this preamble and section 3.5.2 of the RTC.

[145] S. Rep. No. 101–228 at 347 (December 20, 1989), *reprinted in* 5 Legislative History of the Clean Air Act Amendments of 1990 (CAA Legislative History) at 8687 (1998). Other portions of the history of this legislation describe the purpose of title V in similar terms. *See, e.g.,* Conf. Rep. on S. 1630, Speech of Rep. Michael Bilirakis (October 26, 1990), 6 CAA Legislative History at 10768 (1998).

[146] *See* 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d 673, 674–45, 680 (D.C. Cir. 2008) (''Title V did more than require the compilation in a single document of existing applicable emission limits and monitoring requirements. It also mandated that '[e]ach permit issued under [Title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.' . . . [T]he Act requires: a permitting authority may supplement an inadequate monitoring requirement so that the requirement will 'assure compliance with the permit terms and conditions.' '' (citations omitted)); *see also, e.g., In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant,* Order on Petition No. VI–2007–01 at 6–8 (May 28, 2009). This additional purpose is similarly reflected in the legislative history. *See, e.g.,* S. Rep. No. 101–228 at 347, 5 CAA Legislative History at 8687. Various compliance assurance requirements are included within title V and the EPA's implementing regulations; not all are restricted to monitoring. *See* 42 U.S.C. 7661c(a), (b), (c); 40 CFR 70.6(a)(1), (a)(3), (c), 71.6(a)(1), (a)(3), (c); *see also, e.g., In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 2 (East),* Order on Petition Nos. VIII–2022–13 & VIII–2022–14 at 13–17 (July 31, 2023).

[147] Conf. Rep. on S. 1630, Speech of Rep. Michael Bilirakis (October 26, 1990), 6 CAA Legislative History at 10768 (1998) (emphasis added).

[148] 40 CFR 70.1(b) (emphasis added).

[149] *See* 57 FR at 32251(July 21, 1992) (''While title V generally does not impose substantive new requirements, it does require that . . . certain procedural measures be followed, especially with respect to determining compliance with underlying applicable requirements. The program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act. . . . The title V permit program will enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements. Increased source accountability and better enforcement should result.''); *id.* at 32284 (''As discussed above, title V is primarily procedural and is not generally intended to create any new substantive requirements. . . . The title V permit is intended to record in a single document the substantive requirements derived from elsewhere in the Act. Therefore, in most cases the only emissions limits contained in the permit will be emissions limits that are imposed to comply with the substantive requirements of the Act (including SIP requirements).'').

[150] *See* 81 FR 57822, 57826–27 (August 24, 2016) (''For the most part, title V of the CAA does not impose new pollution control requirements on sources. The definition of 'applicable requirements' in the part 70 regulations includes many standards and requirements that are established through other CAA programs, such as standards and requirements under sections 111 and 112 of the Act, and terms and conditions of preconstruction permits issued under the New Source Review programs. 40 CFR 70.2. Once those air quality control requirements are established in those other programs, they are incorporated into a source's title V permits as appropriate. . . . [I]n providing an opportunity for harmonization through title V of the CAA, Congress did not replace or remove the procedures and requirements for establishing substantive

responding to petitions challenging individual title V permits.[151] Likewise, Federal courts across the Nation have acknowledged and reiterated these general principles.[152]

Not only were these general principles well-established at the inception of the title V program, both Congress and the EPA specifically spoke to the manner in which these general principles would guide the interaction between title V and title I permitting programs. For example, a Senate report accompanying title V explained:

> New and modified major sources are already required to obtain construction permits under the [NSR] and [PSD] provisions of the current Act. *EPA should avoid imposing additional construction permit requirements under title V.* Thus, construction permits may continue to be issued under the existing provisions of the Act, but title V will apply with respect to existing source requirements not otherwise required in the construction permit, *e.g.,* fees.[153]

Thus, the legislative history articulates Congress's intent that, notwithstanding the enactment of title V, NSR permits would continue to be issued as they had for over a decade. Title V permits would be used to incorporate the requirements of NSR permits, but not to alter or impose additional NSR-related requirements.

As previously noted, in the 1991 and 1992 preambles to the EPA's initial title V rules, the Agency announced a similar understanding of the intersection of title V and title I permitting. The EPA did not express an intent to use the title V permitting process to review the applicable requirements established in preconstruction permitting programs under title I of the CAA. To the contrary, the EPA stated: ''Any requirements established during the preconstruction review process also apply to the source for purposes of implementing title V. If the source meets the limits in its NSR permit, the title V operating permit would incorporate these limits *without further review.*'' [154] Similarly, the EPA explained: ''The intent of title V is *not to second-guess* the results of any State NSR program.'' [155] Further, ''[d]ecisions made under the NSR and/or PSD programs (*e.g.,* [BACT]) *define applicable SIP requirements* for the title V source and, if they are not otherwise changed, can be incorporated *without further review* into the operating permit for the source. The title V program is not intended to interfere in any way with the expeditious processing of new source permits.'' [156]

The EPA's contemporaneous interpretation of the statute (and the regulations implementing this statute) should be afforded great weight, as the Fifth Circuit acknowledged.[157] Although the EPA departed from this interpretation, in part, from 1997–2017, the EPA's return to this interpretation reflects a better reading of the statute and congressional intent.[158] As the Fifth Circuit stated: ''We find persuasive EPA's view that, because Title V was not intended to add new substantive requirements to the Act, it should not be interpreted as Petitioners urge. . . . This goal, as EPA argues, is at cross-purposes with using the Title V process to reevaluate preconstruction permits.'' [159]

Several public comments from environmental and other interest groups challenged this view. These commenters argued that using title V to substantively review NSR permitting decisions is not the same thing as establishing new substantive requirements because the substantive requirements related to NSR already exist in the SIP.[160] The EPA disagrees. As explained in section III.C.3.a of this preamble, NSR-related requirements of the SIP may be relatively general and require an additional step—the title I permitting process—to define on a case-by-case basis the nature of the requirement for individual sources engaged in construction projects. Thus, while general requirements exist in the SIP to obtain NSR permits that meet certain criteria, the specific requirements that are applicable to a particular source engaged in construction activity exist in conditions in the individual title I NSR permits, which are determined on a case-by-case basis. If title V permits were used to reevaluate substantive title I permitting decisions, the result of such an exercise—at least the result apparently desired by adverse commenters—could be a conclusion that different conditions are necessary to assure compliance with the SIP. To effectuate this conclusion, changes would have to be made to the requirements established through the title I permitting process. Changing the nature of an applicable requirement is functionally the same as creating a new applicable requirement and is, therefore, inconsistent with Congress's design for title V.

Other statutory provisions within title V further support the EPA's interpretation. Title V requires State programs to have ''[a]dequate, streamlined, and reasonable procedures . . . for expeditious review of permit actions . . . .'' [161] Requiring a permitting authority, or the EPA, to go back and review final permitting decisions that have already been subject to the safeguards of public notice and judicial review would frustrate the goal

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requirements that exist in other provisions of the CAA.'').

[151] Hundreds of EPA petition orders include background discussion reiterating this core function of title V. Electronic copies of these orders are available on the EPA's public database, *https://www.epa.gov/title-v-operating-permits/title-v-petition-database.* To the extent individual petition orders contain particularly relevant discussion, they are discussed elsewhere in this preamble.

[152] *See, e.g., Utility Air Reg. Grp.* v. *EPA,* 573 U.S. 302, 309 (2014) (''Unlike the PSD program, Title V generally does not impose any substantive pollution-control requirements.''); *Env't Integrity Project,* 969 F.3d at 250 (''By all accounts, Title V's purpose was to simplify and streamline sources' compliance with the Act's substantive requirements. Rather than subject sources to new substantive requirements—or new methods of reviewing old requirements—the intent of Title V was to consolidate into a single document (the operating permit) all of the clean air requirements applicable to a particular source of air pollution.'' (cleaned up)); *id.* at 244; *see also, e.g., U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 597 (D.C. Cir. 2016); *US* v. *EME Homer City Generation, LP,* 727 F.3d 274, 280 (3rd Cir. 2013); *Sierra Club* v. *Johnson,* 541 F.3d 1257, 1260 (11th Cir. 2008); *Sierra Club* v. *Leavitt,* 368 F.3d 1300, 1302 (11th Cir. 2004); *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015, 1026–27 (D.C. Cir. 2000).

[153] S. Rep. No. 101–228 at 349, 5 CAA Legislative History at 8689 (emphasis added). Similarly, one lawmaker involved in the statute's enactment explained: ''In the past, some provisions of the Clean Air Act—for example, the nonattainment and PSD new source requirements—were, *and will continue to be,* implemented through preconstruction permits.'' Conf. Rep. on S. 1630, Speech of Rep. Michael Bilirakis (October 26, 1990), 6 CAA Legislative History at 10768 (1998) (emphasis added).

[154] 56 FR 21712, 21738–39 (May 10, 1991) (emphasis added).

[155] *Id.* at 21739 (emphasis added).

[156] *Id.* at 21721 (emphasis added); *see* 57 FR at 32259 (July 21, 1992) (similar statements in the preamble to the EPA's 1992 final rule).

[157] *Env't Integrity Project,* 969 F.3d at 544 (''We also agree with EPA that the language in part 70's preamble is probative of Title V's purpose as a whole.'') An agency's contemporaneous interpretation is often given great weight in understanding the meaning of a statute. *See e.g., Good Samaritan Hosp.* v. *Shalala,* 508 U.S. 402, 414 (1993) (''Of particular relevance is the agency's contemporaneous construction which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.' '' (quoting *FHA* v. *The Darlington, Inc.,* 358 U.S. 84, 90 (1958))).

[158] *See Env't Integrity Project,* 969 F.3d at 544 (''We recognize that EPA has reverted to its original interpretation of § 70.2, reflecting its changing views of Title V. We take the agency's change of position into account in determining whether to defer to its position. But even when 'the agency has embraced a variety of approaches' we may still defer to its present position, 'especially' when the current view 'closely fits the design of the statute as a whole.' '' (quoting *Shahala,* 508 U.S. at 417–18; additional citation omitted)).

[159] *Env't Integrity Project,* 969 F.3d at 543–44.

[160] See section 3.5.2 of the RTC.

[161] 42 U.S.C. 7661a(b)(6).

of ''expeditious review of permit actions.'' [162]

Similarly, Congress provided abbreviated timeframes for the EPA to review a proposed title V permit: 45 days for the EPA's independent review and 60 days if presented with a petition to object.[163] Based on ''the abbreviated timeline Congress gave EPA,'' the Fifth Circuit in *Env't Integrity Project* concluded ''that these timelines are inconsistent with an in-depth and searching review of every permitting decision regarding a given source.'' [164] This point is compounded by the fact that title V permits must be renewed every five years.[165] As the Fifth Circuit stated, ''the fact that Title V permits must be renewed every 5 years tends to support the agency's view that Title V was not intended to serve as a vehicle for reexamining the underlying substance of preconstruction permits. Subjecting a source's preconstruction permit to periodic new scrutiny, without any changes to the source's pollution output, would be inconsistent with Title V's goal of giving sources more security in their ability to comply with the Act.'' [166]

In summary, neither the structure of title V nor the congressional record indicates that Congress intended the EPA to reevaluate and rewrite substantive title I preconstruction requirements through the title V process. Title V was enacted largely to identify and consolidate the variety of requirements applicable to each facility and assure compliance with these requirements through provisions like monitoring, recordkeeping, and reporting. Reexamining title I permits through title V would not help address either of these objectives. Moreover, congressional intent for efficiency would be undermined if permitting authorities were required to second-guess complex decisions reflected in State-issued title I permits during title V review and then re-check these decisions during each subsequent title V renewal.[167] Such a review would also be generally incompatible with the limited timeframes that Congress provided for the EPA's review of title V permits. These considerations related to the structure and purpose of title V align with the EPA's interpretations of the statute from the early 1990s, as well as the opinions of Federal courts.

All indications of congressional intent suggest that the EPA's role in oversight over the issuance of title V permits should be limited. In the case of preconstruction permitting requirements derived from title I of the CAA, the purpose of title V is to ensure that the terms and conditions of the preconstruction permit are properly included as ''applicable requirements'' and that the permit contains monitoring, recordkeeping, and reporting sufficient to assure compliance with those permit terms and conditions.[168]

Adverse public comments emphasized other purposes of the title V program: to serve as a comprehensive document that clarifies all CAA requirements to which a source is subject, and to promote compliance and enforcement of such requirements. The EPA agrees that these are important functions of title V permits. The EPA's approach in this final rule integrates all of these key features of the title V program. Title V permits must collect all CAA-based requirements that are applicable to a source and include conditions sufficient to assure compliance with those requirements. But that does not mean that title V permits should be used to reevaluate substantive decisions underlying the establishment of the applicable requirements themselves.

3. Structure of the CAA as a Whole

The EPA's interpretation of ''applicable requirements'' as that term relates to the interface of title I and title V permits is supported by the structure of the CAA as a whole.[169] Specifically, the EPA's interpretation is consistent with the title I permitting mechanisms that Congress provided to establish and define the NSR-related requirements of SIPs; the title I and title III procedures for evaluating, challenging, and enforcing title I permitting requirements; and the overarching system of cooperative federalism reflected in the NSR and title V permitting programs.

a. Implementation of SIP Requirements Through Title I NSR Permits

States must submit SIPs containing NSR permitting programs to the EPA for approval through a rulemaking process.[170] States then determine and define the specific NSR-related requirements of SIPs that apply to individual construction projects by issuing NSR permits to individual facilities. This two-step process under title I is central to the EPA's interpretation of the statutory term ''applicable requirements'' as it relates to the interface between title I and title V permits. It also differentiates NSR-based applicable requirements from other types of applicable requirements as discussed in section II of this preamble.

The portions of a SIP addressing NSR are general in nature. SIPs require new and modified sources to obtain certain permits before beginning construction, specify thresholds and other methods to determine what type of permit a source must obtain, identify other preconditions to obtaining a permit (including requirements related to the NAAQS), and establish guidelines for setting specific limitations and other conditions that must be included in a permit. Because the NSR-related provisions within a SIP are necessarily general, they are not self-implementing, and further fact-specific analysis is required to develop the specific requirements applicable to a particular new or modified source.

The key question is whether title V is the appropriate mechanism to establish (or reevaluate) the specific NSR-related SIP requirements that are applicable to construction activities at a particular source. As noted earlier in this preamble, title V of the CAA does not mandate this outcome, and the structure of title I elucidates that this was not Congress's intent or the best reading of the statute.

Congress required in title I that SIPs regulate construction and, for major sources and modifications, require preconstruction permits.[171] The title I preconstruction programs approved by the EPA into SIPs rely on preconstruction permitting programs to fulfill these statutory directives for both

[162] *Id.*

[163] 42 U.S.C. 7661d(b); *see* 40 CFR 70.8(c), (d).

[164] *Env't Integrity Project,* 969 F.3d at 544; *see also id.* at 545–46 (''Title I [includes] more detailed procedures for in-depth oversight of case-specific permitting decisions. Such permitting decisions follow state appeals or enforcement actions authorized by other provisions of the Act, including citizen suits under Title III. Those mechanisms are better structured to provide agency and citizen oversight of preconstruction permitting. . . . Title V contains none of the procedures that would guide those challenges, as Titles I and III do. . . . And those avenues provide more time for development and consideration of the potential issues.'' (internal citations and quotations omitted)).

[165] 42 U.S.C. 7661a(b)(5)(B), (b)(6); *see, e.g.,* 40 CFR 70.6(a)(2).

[166] *Env't Integrity Project,* 969 F.3d at 544–45.

[167] 42 U.S.C. 7661a(b)(6).

[168] 42 U.S.C. 7661c(a), (c); *see* 40 CFR 70.6(a)(1) and (3), and (c)(1).

[169] *See Utility Air Reg. Grp.,* 573 U.S. at 320 (acknowledging the ''fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'' (internal citations and quotation marks omitted)).

[170] 42 U.S.C. 7410(a)(2)(C). This section of the preamble primarily discusses the issuance of NSR permits under an EPA-approved SIP. Similar principles apply to the issuance of NSR permits under an EPA-promulgated FIP.

[171] *See* 42 U.S.C. 7410(a)(2)(C), 7475(a)(1), 7502(c)(5).

major and minor NSR.[172] It thus follows that the title I preconstruction requirements for individual sources are established under these permitting programs in the SIP, not through title V. The SIPs identify the title I permitting process as the mechanism by which the more general SIP requirements applicable to construction of stationary sources will be defined for each new or modified source. During that title I permitting process, a permitting authority determines which NSR-related requirements of the SIP are applicable and designs specific permit terms and conditions to satisfy these more general SIP requirements. In many situations, this process also includes the opportunity for interested parties to evaluate and challenge the State's decisions. Overall, the process is designed to result in an NSR permit that contains all terms and conditions necessary to satisfy the NSR-related requirements of the SIP. Thus, it is the title I permitting process—not the general requirements within the SIP itself—that defines the ''applicable requirements'' of the CAA related to NSR, at least insofar as title V is concerned.

In summary, the NSR requirements of a SIP are not self-implementing, but they also do not depend on the title V process to be defined. Instead, the applicable NSR-related requirements of SIPs are established through a dedicated title I-based permitting process that typically includes its own public participation opportunities and EPA oversight authority.

The CAA requires that title V permits assure compliance with ''requirements of an applicable [SIP].'' But the CAA does not specify that title V be used to re-create or reevaluate the requirements of the SIP that were already defined through the specific mechanism Congress designed to define them: the NSR permitting process. Again, the purpose of title V is not to create or alter the substantive requirements from other parts of the CAA, but instead to identify, consolidate, and assure compliance with those requirements established in these other programs that apply to each individual source.

b. Oversight of Title I Programs and Permitting Decisions

The many programmatic and case-specific oversight tools contained within title I demonstrate that it is not necessary or appropriate, and Congress did not intend, to use additional title V permit oversight tools to second-guess the results of title I permitting decisions.[173] Title I provides opportunities for programmatic oversight, oversight of individual permitting decisions, and oversight through enforcement.

Through the review of SIP submissions, the EPA ensures that States have programs in place that provide the authority to issue substantively sound preconstruction permits, while respecting Congress's intended role for the States. Congress gave the EPA authority under title I to disapprove any proposed SIPs that are inconsistent with Federal statutory and regulatory authorities governing NSR.[174] For example, if a State submits a proposed SIP containing rules to calculate major source emissions thresholds, and those rules are inconsistent with the CAA or its implementing regulations, the EPA cannot approve the SIP. If the State's program fails to meet statutory or regulatory requirements related to NSR, the EPA can call for a revision of the SIP.[175] Further, if a State fails to properly implement its NSR program, the EPA can take additional actions, including orders, administrative penalties, and civil actions.[176] The availability of these title I-based authorities obviates the need to use title V-based oversight tools to address programmatic issues associated with State NSR programs.

In terms of reviewing individual title I permits, each SIP must provide for public notice and an opportunity for comment on major NSR permits, and this may also be required for other types of permits under preconstruction permit programs.[177] The EPA may provide feedback on State-issued NSR permits through this process.[178] Thus, both interested parties and the EPA can seek to correct potential errors in proposed preconstruction permits, including threshold determinations about whether a source or modification is minor or major, and can challenge the content of permit terms. Should a State permitting authority fail to address legitimate comments, the commenters can seek review of preconstruction permits in State administrative and judicial forums, and the EPA has additional oversight authority under the CAA.[179] The availability of these title I permitting-based avenues for review and oversight of individual title I permitting decisions obviates the need to use title V-based oversight tools to address the same issues with respect to individual construction authorizations.[180]

[172] Adverse comments from environmental and public interest groups on the January 2024 Proposed Rule generally did not engage with the EPA's discussion of the structure of the CAA as a whole, including the mechanisms by which title I preconstruction requirements are established. However, as discussed further in section III.D.3.b of this preamble, some adverse commenters focused on the fact that Congress did not specifically require that the minor NSR program be implemented through permitting. That distinction is not particularly relevant because nearly all SIPs implement the statutory requirements governing minor NSR through title I permitting programs, which generally resemble major NSR permitting programs. To the extent that minor NSR requirements are not implemented through permitting in a particular instance, the EPA's approach recognizes this distinction. As discussed in section II.D.5 of this preamble, if a source does not obtain a title I permit to authorize construction, there would be no permit to establish the ''applicable requirements'' for title V purposes, and the EPA would review whether the title V permit assures compliance with any relevant NSR-related requirements of the SIP.

[173] As stated in section III.E.1 of this preamble, the EPA's view that reevaluation of NSR permits is not appropriate in the title V permitting context does not mean that the EPA agrees that the State reached the proper decision when setting terms and conditions of any particular NSR permit and does not diminish the opportunities to review NSR preconstruction permitting decisions under title I of the CAA. *See Env't Integrity Project,* 969 F.3d at 545–56.

[174] 42 U.S.C. 7410(k)(3).

[175] 42 U.S.C. 7410(k)(5).

[176] 42 U.S.C. 7413(a)(2), (a)(5).

[177] 42 U.S.C. 7475(a)(2); 40 CFR 51.161, 51.165(i), 51.166(q).

[178] Title I of the CAA specifically contemplates that the ''interested persons'' who may comment on State-issued PSD permits include ''representatives of the Administrator.'' 42 U.S.C. 7475(a)(2).

[179] Inherent in this title I permitting scheme and reflected in the congressional record for the 1977 CAA Amendments, is the understanding that the adequacy of State NSR permitting decisions would be subject to review in State administrative and judicial forums. ''In order to challenge the legality of a permit which a State has actually issued . . . a citizen must seek administrative remedies under the State permit consideration process, or judicial review of the permit in State court.'' Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977, at 3892 (1977). Note that the U.S. Supreme Court has also acknowledged the primacy of State courts to adjudicate disputes over NSR permit terms. *See Alaska Dep't of Env't Conservation* v. *EPA,* 540 U.S. 461, 490 n.14 (2004); *see also id.* at 491–94 (addressing the relationship between State court review of NSR permits and Federal oversight tools related to NSR permits). The EPA has expressed similar views when approving individual NSR SIPs. *See, e,g.,* 77 FR 65305, 65306 (October 26, 2012) (The EPA ''interpret[s] the CAA to require an opportunity for judicial review of a decision to grant or deny a PSD permit, whether issued by EPA or by a State under a SIP-approved or delegated PSD program.'').

[180] Some permitting authorities and many regulated entities submitted comments on the January 2024 Proposed Rule expressing either concern or opposition to the EPA's focus on title I-based oversight over individual NSR permits—specifically, the Agency's position that an NSR permit must undergo public notice and the opportunity for comment and judicial review before

Continued

Congress also provided the EPA and interested parties with various enforcement mechanisms to address non-compliance with title I permitting requirements on a facility-by-facility basis. The EPA possesses the authority to issue injunctive orders to halt construction.[181] The EPA may also pursue various types of civil or criminal enforcement actions pursuant to CAA sections 113 and 167.[182] In title III of the CAA, Congress also provided authority for citizens to bring enforcement actions in the first instance seeking civil penalties and injunctive relief against a source that is alleged to have violated certain NSR requirements.[183] These enforcement-based tools can be used to ensure that decisions made in establishing the terms of a major NSR permit, such as BACT limits, were made on reasonable grounds properly supported by the record.[184] Additionally, the enforcement tools can be used to address situations in which a source failed to obtain a required major NSR permit (even if it obtained a minor source permit).[185]

Overall, the availability of these title I oversight tools—the SIP process, NSR permitting oversight, and NSR enforcement—weighs against using title V oversight tools to address alleged defects with NSR permitting decisions. As the Fifth Circuit explained:

> EPA contrasts Title V's silence on this front with more stringent oversight authority provided in Title I, arguing that this supports reading the title V provision to supply a more limited oversight role for the EPA with regard to state implementation of preconstruction permitting programs. The agency explains that Title I is better geared for in-depth oversight of case-specific state permitting decisions such as through the state appeal process or an order or action under section[ ] 113 or section 167. And, the agency urges, the absence of such schemes in Title V shows Congress did not intend to recapitulate the Title I process in Title V. We find this reasoning persuasive.[186]

Public comments from environmental and other interest groups argued that these title I-based oversight tools are more burdensome and less efficient mechanisms for addressing perceived deficiencies with NSR requirements compared to title V's oversight tools.[187] Notwithstanding these concerns, the EPA considers the use of title I oversight tools to resolve title I issues to be more consistent with the structure of the CAA and with congressional intent than the use of title V oversight tools. Further, these title I-based oversight tools are more effective than the more limited title V oversight tools.[188]

c. Cooperative Federalism and Congressional Intent

Congress, the EPA, and the courts have often described the CAA as a program of cooperative federalism.[189] The EPA and the States work together to realize the goals of the CAA, but they have different roles. States have the ''primary responsibility'' for developing SIPs in the first instance as well as issuing title I permits under SIP programs for sources within their jurisdiction.[190]

There is no indication that, in enacting title V, Congress intended to change the balance of State responsibility and Federal oversight of title I permitting programs. To the contrary, as noted in section III.C.2 of this preamble, the legislative history surrounding the 1990 CAA Amendments suggests that Congress did not intend for the title V program to change the implementation of title I permits. Moreover, the fact that Congress specifically provided a title I-based mechanism to establish the applicable NSR-related requirements, as well as title I- and title III-based tools for the EPA and citizens to oversee this program, weighs against using title V to reevaluate, reestablish, or otherwise oversee those title I requirements. Consequently, a reading of title V that would transform it into an opportunity to reevaluate previous preconstruction approvals, instead of simply incorporating existing requirements into one document, would inappropriately ''alter the fundamental details'' of the oversight authorities the EPA has under title I.[191]

The text of the CAA does not indicate that Congress intended to create this type of additional administrative oversight mechanism for preconstruction permitting actions in an operating permit program designed to consolidate and further enforcement of existing requirements. While there is language in title V requiring that a permit ''assure compliance with applicable requirements of this chapter,'' [192] and similar language in other parts of title V, this type of general language does not clearly or specifically require a title V permitting authority to reevaluate preconstruction permitting decisions that have already been made under title I, and subject to review under title I, each time that it issues or renews a title V permit. Instead, this general language in the statute should be read to mean that the title V permit must include conditions to assure compliance with the terms and conditions of the source-specific preconstruction permits.

In summary, as the Fifth Circuit concluded in its close examination of Title V:

> Beyond the structure of Title V, EPA also persuasively grounds its interpretation in the structure of the Act as a whole. According to EPA, when Congress added preconstruction permitting requirements to Title I in 1977, it understood that the adequacy of state preconstruction permitting decisions would be subject to review in state administrative and judicial forums. It gave EPA oversight authority over preconstruction permitting only in specific ways, to do specific things. For example, Congress delineated the processes EPA must go through to approve SIPs. When it enacted Title V thirteen years later, Congress granted EPA no such authority. Congress gave no clear indication that it intended to alter the balance of oversight EPA has over state permitting processes. Section 7661c(a)'s requirement that a Title V permit assure compliance with applicable requirements is general and broad and does not clearly or specifically require the revisiting of preconstruction permitting decisions. Once again, the elephants in mouseholes canon supports this reading.[193]

4. Policy Reasons

In addition to the textual and legal interpretations supporting this action, several policy considerations also support this rule. The EPA's approach ensures that applicable requirements established in different CAA programs are treated consistently in title V permitting, accounts for limitations associated with title V oversight tools, emphasizes title I avenues of review,

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it could be said to conclusively establish the ''applicable requirements'' of the SIP for purposes of title V. That specific topic is discussed further in section III.D.5 of this preamble.

[181] 42 U.S.C. 7413(a)(5)(A), 7477.

[182] 42 U.S.C. 7413, 7477.

[183] 42 U.S.C. 7604(a)(1), (a)(3).

[184] *See, e.g., Alaska Dep't of Env't Conservation,* 540 U.S. at 484–88 (affirming application of CAA section 167 in this context).

[185] *See e.g., United States* v. *S. Ind. Gas & Elec. Co.,* No. IP99–1692–CM/F, 2002 WL 1760699, at *3–5 (S.D. Ind. July 26, 2002); *United States* v. *Ford Motor Co.,* 736 F. Supp. 1539, 1550 (W.D. Mo. 1990).

[186] *Env't Integrity Project,* 969 F.3d at 542 (internal quotations and citations omitted)).

[187] See section 3.4 of the RTC.

[188] See section III.C.4.b of this preamble for further discussion of the practical considerations and other policy reasons why title V oversight tools are not well-suited to resolving complex NSR permitting issues.

[189] *See, e.g.,* 42 U.S.C. 7401(a)(3)–(4); *Env't Integrity Project,* 969 F.3d at 545.

[190] 42 U.S.C. 7407.

[191] *Whitman* v. *Am. Trucking Assn's,* 531 U.S. 457, 468 (2001) (''Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'').

[192] *E.g.,* 42 U.S.C. 7661c(a).

[193] *Env't Integrity Project,* 969 F.3d at 545 (cleaned up).

and respects the finality of, and fosters certainty in, title I permitting decisions.

a. Consistent Treatment of Applicable Requirements From Other CAA Programs

The EPA's approach aligns the Agency's treatment of preconstruction permits with how the Agency has consistently treated other ''applicable requirements'' under title V since the inception of the title V program. As detailed in section II.E of this preamble, for other types of applicable requirements, permitting authorities do not and cannot reconsider the content of those requirements in title V permits. Nor does the EPA in the Agency's title V permitting oversight role. For instance, neither permitting authorities nor the EPA can use the title V permitting process to revise the self-implementing substantive requirements of an NSPS established under CAA section 111 or a NESHAP established under CAA section 112. Similarly, it would not be appropriate for permitting authorities or the EPA to use the title V process to review or revise any self-implementing requirements of a SIP approved under CAA section 110. As explained in section II.G of this preamble, even if the EPA disagrees with the content of a SIP, until the Agency approves a corrective SIP revision or issues a FIP, the SIP requirement remains an ''applicable requirement'' that should be incorporated unchanged into the title V permit. Public commenters neither challenged these general principles nor presented any compelling reasons to treat applicable requirements related to the NSR program differently from applicable requirements under other CAA programs.

For purposes of establishing ''applicable requirements'' for title V permitting, it is logical and appropriate to treat decisions that go through similar processes similarly. Each of the applicable requirements addressed in the previous paragraph were established pursuant to a process that included public notice and the opportunity for comment and judicial review, which provides an opportunity for interested parties to review and, if necessary, challenge the sufficiency of those requirements at the time they are established. Once they are established following these procedures, it would be inappropriate to reevaluate the substance of these requirements in title V permitting. Likewise, most source-specific NSR permitting decisions must go through a similar process at the State level. Once established through the appropriate procedures, and unless and until the terms and conditions of an NSR permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism (such as a State court appeal or enforcement action), the ''applicable requirements'' remain the terms and conditions of the issued NSR permit. These requirements should be incorporated into the title V permit without further review like all other similarly established applicable requirements.

Any differences between NSR-based applicable requirements and other types of applicable requirements do not provide a convincing reason to treat NSR requirements differently. For example, the fact that NSR permits are reviewed through the State courts, as opposed to Federal courts, is not material. As discussed in section III.D.2 of this preamble, regardless of the jurisdiction involved, both processes are functionally similar and offer similar levels of public involvement and measured decision making.[194]

Another difference is that NSR-related requirements of the SIP are often general and would not be described as ''self-implementing'' in the same manner as NSPS, NESHAP, or certain source-specific SIP requirements that are conclusively established by rulemaking. As explained in section III.C.3.a of this preamble, the NSR-related requirements of the SIP are defined for individual sources not through rulemaking, but rather through an adjudication: the NSR permitting process. Although the processes for deriving applicable requirements by rulemaking and adjudication are different in some respects, their relationship to the title V process should be the same. Under both processes, regulatory agencies determine the legal requirements that apply to a facility, following a process that typically involves public input and concludes in a final decision that is subject to judicial review. After a source goes through the preconstruction permitting process and obtains a final NSR permit, the terms of that NSR permit are immediately applicable and enforceable in the same manner as any NSPS, NESHAP, or source-specific SIP provision established through rulemaking. Provided there was an opportunity to comment on and seek judicial review of such requirements when they were established, the title V permitting process should not be used to further adjudicate (*i.e.,* reopen or reconsider) those applicable requirements established by rulemaking or by adjudication.

The EPA's approach standardizes the Agency's treatment of questions related not only to the content of applicable requirements but also to the applicability of different types of CAA requirements. See section III.D.3 of this preamble for additional information about this particular topic.

b. Procedural, Resource-Based, and Other Practical Limitations of Title V Oversight Tools

In the EPA's experience, NSR permitting issues are among the most factually and legally complicated issues raised during the title V permitting (and petition) process. For multiple reasons, the oversight tools associated with the title V permitting process are a poor fit for resolving NSR permitting issues. Compared to the available title I avenues for review, the title V process features limited timelines and procedural opportunities to fully evaluate complex title I issues. Reviewing complex NSR issues through title V involves a considerable resource burden and often is impracticable for decisions made years ago or even for recent decisions, given the tight timelines written into title V.

Public comments from environmental and other interest groups argued that the title V permitting process provides an efficient and effective mechanism for oversight of title I permitting decisions.[195] The EPA does not find those policy-focused comments persuasive, for the reasons discussed below. Similarly, in light of the legal considerations discussed above, they do not provide a basis for the EPA to adopt a different approach.

Procedural constraints associated with title V oversight tools weigh against using these tools to resolve complex NSR issues. The CAA provides 18 months for a State to act on a complete title V permit application. Commenters argued that this should be ample time for a permitting authority to consider not only title V issues, but also NSR issues.[196] Based on the EPA's experience overseeing State title V programs, the Agency disagrees. Many permitting authorities already struggle to issue title V permits in a timely fashion due to resource constraints and other issues; requiring them to additionally consider or reconsider complex NSR issues through this

[194] To the extent Federal court review of NSR decisions offers independent value beyond that which may be achieved through State courts, the CAA specifically provides for various means by which the EPA or the public can raise NSR issues to Federal courts. See section III.C.3.b of this preamble for additional information.

[195] See section 3.4 of the RTC.

[196] See section 3.5.2 of the RTC.

process would inevitably lead to further delays that would be contrary to the statutory timelines in title V and title V's overall purposes.

Once a permitting authority has proposed a title V permit, Congress provided the EPA with only 45 days to review a proposed title V permit, followed by a 60-day period for the public to petition the Agency to object, followed by a 60-day period for the Agency to rule on a petition to object.[197] These brief title V review periods are inconsistent with an in-depth and searching review of potentially every source-specific preconstruction permitting decision that has been made by the permitting authority. By contrast, available title I review mechanisms—State court appeals and enforcement actions—are not subject to the same time constraints, allowing more time for development and consideration of NSR permitting decisions.

In addition to time constraints, the title V permitting and petition processes involve fewer opportunities to develop the factual record necessary for a complete review of complex NSR permitting issues. For example, by the time the EPA receives a title V petition, the Agency's review is generally limited to the record developed by the permitting authority.[198] By contrast, some State permit appeal and enforcement processes provide more in-depth oversight than title V could afford. Some States have administrative appeal processes that enable additional factual development before a final decision is reached on the permit. In addition, ''unlike the permitting process, the enforcement process allows for discovery, hearings, cross-examination of witnesses, and expert testimony,'' all of which aid the fact-finder in deciding whether major or minor source preconstruction requirements apply to a facility or whether such requirements were correctly established.[199]

Moreover, once a title V petition is filed, there are no formal opportunities for other affected parties, such as the permitted source or the State permitting authority, to directly participate in the review process; their opportunity to develop their position occurs earlier in the permitting process.[200] These other affected stakeholders have more procedural safeguards in State appeal processes and enforcement actions than in the title V petition process. For example, they may be parties to the action and appear with the opportunity to contest points raised by public challengers through briefs or other filings. Overall, title V oversight processes contain fewer mechanisms than title I oversight processes to fully consider and resolve complex NSR issues.[201]

Title V's limited effectiveness in addressing NSR issues is compounded by the fact that title V permits must be renewed every five years. This fact, along with the EPA's longstanding position that all aspects of a title V permit are subject to review during renewal permit proceedings,[202] gives rise to the possibility that, in the absence of the Agency's approach, interested parties may seek to use title V oversight tools to review long-past NSR permit decisions. For example, in the 2016 *PacifiCorp-Hunter I* petition that precipitated the EPA's current interpretation, certain interest groups challenged an NSR applicability decision made nearly 20 years prior. Given State and Federal record retention schedules, staff turnover at State permitting authorities, and similar practical constraints associated with the passage of time, it may simply be impossible in a title V permitting action for a State to re-create a complete, defensible administrative record to support complex, substantive NSR permitting decisions, particularly those made long ago. Instead of pursuing challenges to NSR permitting decisions when a State incorporates a preconstruction permit into a title V permit or during subsequent title V renewals, interested parties can obtain more direct and timely relief through State permit appeals and enforcement actions at the time a title I permit is issued.

These constraints impact not only the EPA and State permitting authorities but also interested members of the public. Some commenters suggested that the title V petition process is simpler and less expensive, and thus more accessible to the public, than title I oversight tools.[203] But as the same commenters acknowledged, there are a number of limitations on the public's ability to effectively use the title V petition process to address NSR issues.[204] Notably, Congress placed the burden on petitioners to demonstrate to the EPA's satisfaction that a title V permit does not satisfy the CAA.[205] In other words, in situations in which NSR issues are properly within the scope of the EPA's title V review, the Agency is not required to undertake an exhaustive independent review of a State's NSR decisions. Instead, petitioners are required to provide sufficient evidence to the EPA to demonstrate that the State's NSR permitting decisions did not comply with its SIP-approved regulations or that the State's exercise of discretion under such regulations was unreasonable or arbitrary.[206] Although this demonstration requirement reduces some of the aforementioned resource burdens on permitting authorities and the EPA, it places these burdens on the public, who are subject to similarly tight timelines and the other procedural limitations discussed in the preceding paragraphs (including limitations on the public's access to data). As a result of these constraints, combined with the complexity of NSR permitting decisions, it has historically been relatively uncommon for petitioners to successfully demonstrate that an NSR-related deficiency warrants the EPA's objection to a title V permit.[207] As discussed throughout this preamble, interested parties would be better served to develop any challenges to NSR permitting decisions using the title I process.

Title V mechanisms are poorly suited not only for considering NSR-related issues, but also for resolving NSR-related issues. The relief that the EPA can provide through title V to correct an NSR deficiency is limited and indirect. When the EPA objects to a title V permit on the grounds that NSR requirements were not properly established by a State,

[197] 42 U.S.C. 7661d(b)(1)–(2).

[198] *See* 40 CFR 70.13.

[199] *Citizens Against Ruining the Env't* v. *EPA,* 535 F.3d 670, 678 (7th Cir. 2008).

[200] 85 FR 6431, 6442 (February 5, 2020).

[201] *See Env't Integrity Project,* 969 F.3d at 545–46 (''We are persuaded by the agency's contrasting Title V against Title I's more detailed procedures for in-depth oversight of case-specific permitting decisions. Such permitting decisions follow state appeals or enforcement actions authorized by other provisions of the Act, including citizen suits under Title III. Those mechanisms are better structured to provide agency and citizen oversight of preconstruction permitting . . . . Title V contains none of the procedures that would guide those challenges, as Titles I and III do . . . . And those avenues provide more time for development and consideration of the potential issues.'' (internal citations and quotations omitted)).

[202] *See, e.g., In the Matter of Wisconsin Public Service Corporation, Weston Generating Station,* Order on Petition No. V–2006–4 at 5–7 (December 19, 2007).

[203] See section 3.4 of the RTC.

[204] See section 3.4 of the RTC.

[205] 42 U.S.C. 7661d(b)(2).

[206] *See, e.g., Appleton Order* at 5.

[207] In addressing individual title V petitions between 1997 and 2017, the EPA rarely engaged with the merits of the substantive NSR issues at stake. The EPA denied between 75 and 80 percent of all petition claims implicating NSR issues. When the EPA did grant such claims and object to a source's title V permit, over 80 percent of such objections simply required the State permitting authority to better explain its NSR permitting decision. Viewed another way, only two to three percent of NSR-related claims in title V petitions resulted in the EPA expressly concluding that an NSR permitting decision was substantively flawed.

such objection does not directly invalidate an NSR permit or stop the initial construction or operation of a particular source authorized by an NSR permit. This is true not only when the NSR permit was issued long ago and construction has already been completed,[208] but also when the NSR permit was issued more recently and construction has not yet begun. An EPA objection similarly cannot directly require the State to amend an NSR permit. Instead, the EPA's authority to object to a title V permit reaches only the terms of the title V permit itself. For example, the EPA could direct a State to include a compliance schedule in the title V permit directing the source to apply for a new NSR permit. Resolving such an objection would generally require some type of additional, legally distinct NSR permitting action by the State permitting authority. If the State ultimately failed to update the title V permit in a manner sufficient to resolve the EPA's objection, the Agency could assume responsibility to issue the title V permit.[209] But even so, the EPA would remain unable to directly change the terms of the underlying NSR permit or to issue a new NSR permit to the source without first pursuing title I-based oversight authorities.[210] Thus, no matter what the EPA might do with respect to a title V permit, the Agency lacks title V-based authority to directly intercede and fix issues in NSR permits.

Certain public commenters downplayed these limitations, highlighting examples in which public involvement during the title V permitting process provided an impetus for substantive NSR-related permit changes.[211] But as these commenters admit, in each of the circumstances described, other non-title V mechanisms were used to actually correct the potential NSR deficiencies. The EPA understands that concerns raised during a title V permitting process, whether raised by the public or the EPA, might ultimately motivate a permitting authority or permittee to address NSR permitting defects through NSR permitting channels.[212] But the point remains: title V oversight tools provide only indirect means of encouraging NSR-related changes and this limitation shows that the title V permitting process was not designed to be the primary mechanism to address perceived deficiencies related to NSR permitting.

Because title V oversight tools provide an ill-suited forum for considering and resolving the complex problems associated with NSR permitting, title V permitting authorities and the EPA should only consider whether the terms and conditions of an NSR permit have been properly included in a title V operating permit and whether there is sufficient monitoring, recordkeeping, and reporting to assure compliance with those terms and conditions. It is more efficient for State permitting authorities, the public, and the EPA to focus on these core title V issues, which are more clearly redressable through title V oversight tools, when preparing title V permits, challenging title V permits, and reviewing title V permits.

c. Emphasizing Title I Avenues of Review, Respecting Finality, and Fostering Certainty in Title I Permitting Decisions

As explained in the preceding subsection, the title I permitting process (and other oversight opportunities under titles I and III of the CAA) is better suited to address public concerns with NSR issues than the title V permitting process. The EPA's approach not only recognizes the limitations on using title V to review NSR issues, but is also consistent with the importance of public involvement in the title I permitting process to address these issues. This approach encourages interested parties to engage contemporaneously at the State level to appeal preconstruction permitting decisions that they believe to be incorrect.

During the time period in which the EPA nominally considered the merits of NSR issues through the title V permitting and petition process in certain circumstances, the Agency observed that many petitioners would only raise NSR-related concerns through the title V process and would not seek relief through title I mechanisms. By doing this, interested parties bypassed an available public participation opportunity and denied the State an opportunity to hear and remedy public concerns contemporaneous with the State action. Moreover, given the inherent difficulty in demonstrating NSR permit flaws and the lack of effective relief available through the title V permitting process, use of title V (rather than NSR appeal processes) may have ultimately been less effective at fostering sound NSR permitting decisions. The EPA considers it better policy to encourage the public to use title I processes to address NSR-related concerns at the time these permits are issued and to reserve the title V permitting process for issues that may be more effectively addressed through title V authorities (*e.g.,* monitoring).[213]

Declining to review title I permitting decisions during the title V process avoids duplication and inefficiency, respects the finality of NSR permitting decisions that are subject to public notice and the opportunity for comment and judicial review, and acknowledges regulated entities' need for certainty when investing in the construction and modification of sources.

The availability of public notice, the opportunity for comment, and the opportunity for judicial review of underlying NSR permit actions weigh heavily against the need to repeat all or some of these procedures through title V permitting. The EPA's approach avoids an unnecessary and inefficient ''second bite at the apple'' along with a potentially unlimited number of additional ''bites'' each time a title V permit is reviewed.

The EPA's approach respects the finality of a permitting authority's title I permitting decisions, provided such decisions were made with the requisite level of formality, consideration, and public process (*i.e.,* issued under title I authorities following public notice and

[208] As explained previously, the EPA's regulations allow sources subject to major NSR preconstruction permitting requirements to apply for a title V permit within one year after beginning operation (well after beginning and completing construction), in most cases. 40 CFR 70.5(a)(1)(ii), 71.5(a)(1)(ii). The CAA similarly allows sources to apply for a title V permit up to 12 months *after* becoming subject to title V. 42 U.S.C. 7661b(c). This shows that Congress did not intend for the title V permitting process to be used to prevent the construction of a source authorized under title I.

[209] 42 U.S.C. 7661d(c). The EPA could also assume responsibility to issue title V permits within a jurisdiction after determining, for example, that the State failed to properly administer and enforce its title V program. *See* 42 U.S.C. 7661a(i)(4); 40 CFR 70.10(b)(4), (c), 71.4(c).

[210] To directly mandate changes to an NSR permit issued by a State under an EPA-approved SIP, the Agency would need to pursue title I remedies. For example, a court order following a State court appeal or an enforcement action could directly mandate that the State permitting authority revise specific NSR permit terms or issue a different type of NSR permit. Alternatively, if the EPA wanted to directly issue an NSR permit to a source that was previously subject to a State permitting authority's jurisdiction, the Agency would first have to issue a ''SIP Call'' under CAA section 110(k) and ultimately impose a FIP, after which the Agency would retake the legal authority to issue NSR permits.

[211] See section 3.5.2 of the RTC.

[212] Another commenter provided examples in which a State permitting authority voluntarily used an NSR permitting process to address title V-related problems identified in EPA objections to title V permits. The willingness of some permitting authorities to use the NSR permitting process to address title V-related problems is beside the point. See section 3.4 of the RTC.

[213] As explained in section IV.B.5.a of this preamble, if there are no opportunities to participate in title I permitting decisions, title V will serve as a backstop to ensure that the public has an opportunity to comment on whether a source's title V permit assures compliance with the relevant NSR-related requirements of the SIP.

the opportunity for comment and judicial review). By contrast, allowing NSR permitting decisions to be reviewed using the title V permitting process would significantly undermine the finality of State title I permitting decisions. This would decrease the relative importance of States in the system of cooperative federalism established by Congress.

The EPA finds that the best policy (and best reading of the CAA as a whole, as described in section III.C.3 of this preamble) is that, where available, interested members of the public should directly participate in State preconstruction permitting decisions and, if necessary, seek review in State court immediately thereafter. This is a more direct and timely way to identify and correct errors in preconstruction permits. It provides for such review before sources reasonably begin relying on those permits to invest substantial resources into a facility. Thus, the EPA's approach fosters certainty and avoids upsetting settled expectations and reliance interests of sources that have obtained a legally enforceable preconstruction permit under title I. By contrast, under the EPA's former approach, stakeholders would always face the possibility that the Agency could identify errors with the State preconstruction permitting decisions during title V permit issuance or renewal. In such a circumstance, discovery of perceived errors could come years after the fact, long after a source is constructed and operating, either when a title V permit first incorporates the relevant NSR requirements, or decades after the fact, after the title V permit is subsequently renewed multiple times. In fact, this appears to be precisely the outcome desired by some environmental and other interest groups, who argued in comments that there are advantages to raising substantive NSR concerns years after a preconstruction permit is issued.[214] The EPA appreciates these concerns, but they do not provide a compelling reason to change the Agency's approach. Using the title V permitting process to address such issues years after the fact would significantly increase uncertainty for the regulated community. It would also increase the burden on the EPA, State permitting authorities, and the courts to consider such long-distant issues. As summarized by the Fifth Circuit in examining EPA's current approach:

> EPA's position also respects the finality of the preconstruction permitting decision. The agency reasoned that it would be inefficient to allow review via the Title V permitting process even after the preconstruction permits had been subject to public notice and comment and an opportunity for judicial review. And those avenues provide more time for development and consideration of the potential issues. We are persuaded that EPA's construction of Title V respects the finality of state preconstruction permitting decisions, which is consistent with the Act's cooperative federalism. Petitioners' contrary view of Title V would allow a federal agency to upset states' permitting decisions with no clear mandate from Congress to do so.[215]

D. Application of the EPA's Approach to Different Fact Patterns

Determining the extent to which title V should be used to address NSR-related requirements of the SIP requires a fact-specific, case-by-case analysis of multiple variables associated with both title I and title V permitting. This subsection of the preamble explores the situations in which NSR-related applicable requirements of the SIP would be conclusively established through the NSR process and thus not subject to further review through title V. In general, the EPA's framework applies similarly regardless of: (i) the stage of the title V permitting or oversight process at issue; (ii) the NSR permit's origin (*i.e.,* from a SIP or a FIP), (iii) the type of substantive NSR requirement at issue (*e.g.,* NSR permit terms or major NSR applicability); and (iv) the procedures by which the NSR permit is incorporated into the title V permit (*e.g.,* sequentially or concurrently issued permits).

This subsection of the preamble also addresses the limited situations in which the title V process could be used to further address or define the requirements of the SIP, such as if no NSR permit has been issued at all, an NSR permit has been issued without public notice and the opportunity for comment and judicial review, or limited situations in which there is a substantive overlap between title V and NSR requirements.

As appropriate, the EPA addresses significant comments on each of these topics within the relevant subsections below. In the January 2024 Proposed Rule, the EPA solicited comment on three ''alternative approaches'' that would have involved using title V permits to address substantive NSR issues in additional, targeted situations. At the same time, the EPA expressed the Agency's view that the Agency's existing interpretations and policies reflect the best approach from both a legal and policy standpoint, and that each of the alternative approaches suffers from legal and/or policy drawbacks. Comments from permitting authorities and regulated entities almost universally opposed these alternatives.[216] Comments from environmental groups expressed relative support for some of the alternatives but did not provide compelling legal or policy reasons to adopt any of these alternative approaches.[217] Thus, as explained further in the following subsections, the EPA is not finalizing any of those alternative approaches or other alternative approaches that commenters suggested but which the Agency did not propose.

1. Different Stages of the Title V Permitting and Oversight Process

The EPA's views regarding the NSR-title V interface have primarily been discussed in the context of one specific oversight tool: the EPA's responses to title V petitions. This final rule explicitly codifies the scope of issues that would be within the scope of the EPA's review in responding to title V petitions. However, the concepts underlying the EPA's current approach, as well as this final rule, are not confined to title V petitions but extend to other aspects of title V permitting. Specifically, the EPA's approach is equally relevant: (i) when prospective permittees prepare title V permit applications; (ii) when permitting authorities (including the EPA, where applicable) develop title V permits and respond to public comments on draft title V permits, (iii) when the Agency reviews and decides whether to object to proposed title V permits during the 45-day review period; (iv) when the Agency considers reopening title V permits for cause; and (v) when the Agency considers other programmatic oversight actions under, for example, 40 CFR 70.10.

2. Different Origins of NSR Permits (SIP or FIP)

As described earlier in this preamble, the EPA's approach to reviewing NSR issues through title V diverged in the late-1990s depending on whether the underlying NSR permit was issued under a State's EPA-approved SIP rules (which the Agency would review) or EPA-promulgated FIP rules (which the Agency would not review). At the time, this distinction was based on the differing routes to review such NSR permitting actions; appeals of SIP-based NSR permits were reviewed through the State court system, while appeals of FIP-

[214] See section 3.4 of the RTC.

[215] *Env't Integrity Project,* 969 F.3d at 546 (internal citations and quotations omitted).

[216] See section 3.5.2 of the RTC.

[217] See section 3.5.1 of the RTC.

based NSR permits proceeded through the EAB process and Federal court system.

Rather than presenting a basis to treat SIP-based and FIP-based title I permits differently, these NSR permit appeal pathways highlight why they should be treated similarly. Both SIP-based and FIP-based appeal pathways promote public involvement and ensure the substantive validity of the underlying NSR permitting decisions. Both pathways are similar to those used to establish (and, if desired, challenge) other types of applicable requirements of the CAA.[218] The fact that one pathway leads to State courts and the other pathway leads to Federal courts simply reflects the system of cooperative federalism established by Congress for the NSR program.[219]

Overall, the EPA does not view the difference between NSR-based requirements established pursuant to a SIP and NSR-based requirements established pursuant a FIP to be meaningful insofar as title V is concerned. Both processes effectively establish and define the NSR-related requirements of title I for title V purposes. Accordingly, this rule codifies the EPA's current approach, which does not differentiate between NSR permits issued pursuant to a SIP or a FIP.[220]

The EPA observes that the majority of NSR permits issued across the Nation are now issued under EPA-approved SIP rules (as opposed to FIP rules). For convenience and brevity, throughout this preamble the EPA refers to NSR permits issued pursuant to a SIP or requirements of a SIP. Each of those references is intended to apply equally to NSR permits and requirements associated with a FIP.

3. Different Types of NSR Requirements (Permit Content, Applicability, etc.)

The EPA's current approach, as reflected in this final rule, applies regardless of the types of NSR requirements involved. Once an NSR permit has been issued under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, that NSR permit defines all NSR-related requirements of the SIP that are applicable to the construction of the new source or modification that was the subject of the permit.

The terms of both major and minor NSR permits are applicable requirements that must be included in title V permits.[221] These permit conditions are not derived or created within or through the title V process. Thus, the title V permitting process may not be used to reevaluate the terms or content of such major or minor NSR permits (*e.g.,* whether the permit limits reflect BACT). Notably, this construct extends beyond simply not reevaluating the contents of NSR permits to other questions concerning NSR-related requirements of a SIP that may be relevant to a particular preconstruction authorization, including whether additional requirements of the SIP (*e.g.,* major NSR requirements) should have been applicable to the construction, and questions regarding other types of SIP requirements that establish preconditions for NSR permit issuance (*e.g.,* whether the permitting authority correctly determined that the construction would not cause or contribute to a violation of the NAAQS).

a. NSR Permit Content

When a permitting authority authorizes construction by issuing either a major NSR permit or minor NSR permit, it establishes emission limits and other standards necessary to satisfy the SIP requirements relevant to either major or minor NSR. For example, PSD permits must include emission limits reflecting BACT; NNSR permits must include emission limits reflecting the Lowest Achievable Emissions Rate (LAER), and minor NSR permits may contain analogous requirements depending on the terms of the SIP. Although SIPs contain general criteria for establishing those limits, individual permit actions are necessary to specifically define the limits for each source subject to NSR. Once these limitations are established through the NSR permitting process, the title V process may not be used to reevaluate whether the resulting limits reflect the general SIP requirements related to BACT, LAER, or other similar requirements.

This framework for NSR permit content appears to be a relatively uncontroversial aspect of the EPA's approach.[222] However, one set of public comments from environmental and other interest groups presented extensive arguments regarding a narrow fact pattern related to NSR permit content.[223] Specifically, these commenters argued that the EPA's approach would allow NSR permits to contain allegedly illegal exemptions from emission limits during periods of startup, shutdown, and malfunction (SSM). Commenters presented a number of reasons why this particular type of alleged NSR permit defect should be subject to review through the title V process. These comments were substantively identical to arguments that the EPA recently considered in a title V petition response concerning the Torrance Refinery in Torrance, California.[224] The EPA's petition response order explains, in detail, why this type of issue is no different from any other type of claim alleging that the terms of an NSR permit are not stringent enough to satisfy the legal requirements governing the issuance of an NSR permit and therefore why such issues are not subject to review through the title V process. The EPA affirms that position in this rule.

b. NSR Applicability

In the January 2024 Proposed Rule, the EPA solicited comment on an alternative approach that would have treated questions about major NSR applicability differently from other

[218] See section III.C.4.a of this preamble for additional information.

[219] For additional information about how the EPA's approach to SIP-based NSR permits comports with the structure of the CAA and congressional intent, see sections III.C.2 and III.C.3 of this preamble.

[220] This approach is consistent with the 1992 to present regulatory definition of ''applicable requirement,'' which treated SIP-based and FIP-based requirements the same. *See* 40 CFR 70.2, 71.2 (definition of applicable requirement, items (1) and (2)) (2025).

[221] The EPA's prior regulations reflected this understanding. Since 1992, the definition of ''applicable requirement'' has included ''*Any* term or condition of *any* preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including Parts C or D, of the Act.'' 40 CFR 70.2 (emphasis added) (2025). This definition included not only the specifically listed major NSR permits (required under parts C or D), but also minor NSR permits issued under a SIP. This language, included in the 1992 final rule, reflects a change from the language in the 1991 proposed rule, which only included major NSR permits. *See* 57 FR at 32276 (July 21, 1992); 56 FR at 21768 (May 10, 1991). Nonetheless, to provide maximum clarity to the public, the EPA is finalizing a small change to make the inclusion of minor NSR permit requirements more explicit. Note that not every term of every NSR permit is an ''applicable requirement'' that must be included in a title V permit. Some terms of NSR permits may no longer be applicable because, for example, they are obsolete or extraneous. *See White Paper for Streamlined Development of Part 70 Permit Applications,* 7–16 (July 10, 1995).

[222] Notably, public comments on the January 2024 Proposed Rule opposing the EPA's approach raised fewer concerns and challenges to how the Agency's approach applies to questions about NSR permit content; most adverse comments instead challenged how the Agency's approach applies to questions about major NSR applicability, discussed in the next subsection of this preamble. The EPA also observes that the adverse decision from the Tenth Circuit discussed in section III.A.4 of this preamble did not directly speak to the Agency's treatment of questions regarding NSR permit content; the court's opinion addressed only the Agency's obligations to review questions concerning major NSR applicability under the language of EPA's former regulations as interpreted by the court. *See Sierra Club* v. *EPA,* 964 F.3d 882 (10th Cir. 2020).

[223] See section 3.5.1 of the RTC.

[224] *See Torrance Order* at 49–60.

types of NSR issues. Specifically, the alternative would have involved using the title V permitting process to review issues related to major NSR applicability (*i.e.,* whether a source should have received a major NSR permit instead of a minor NSR permit), regardless of whether such questions had already been conclusively decided in the process of issuing a minor NSR permit with public notice and the opportunity for comment and judicial review.[225] The majority of public comments from permitting authorities and regulated entities opposed this alternative for the same reasons that they supported the EPA's overarching approach (as discussed in section III.C of this preamble).[226] The EPA is not finalizing this alternative approach but instead is finalizing this rule as proposed and applying the same approach to all types of NSR issues, including questions about NSR applicability.

Comments from certain interest groups and one State permitting authority argued that the title V process should be used to determine which requirements are applicable to a source, even if it should not be used to second-guess the content of such requirements.[227] Some of these comments stressed the importance or significance of decisions concerning major NSR applicability. Although the EPA appreciates the importance of NSR applicability decisions, their relative importance does not, in and of itself, present a reason to treat such decisions differently from other NSR permitting decisions within the context of title V permitting.

Many of the legal arguments included in adverse comments focused on how the EPA's approach applies to questions regarding major NSR applicability.[228] Commenters cited several statutory provisions within title V that implicitly or explicitly refer to title I permitting requirements, specifically CAA sections 502(a), 502(f), and 504(a). Based on these references, commenters argued that the requirement to obtain a preconstruction permit is an ''applicable requirement'' of the CAA. Therefore, commenters concluded that the title V permitting process must be used to determine whether major NSR permitting requirements are applicable to a particular construction activity. The EPA disagrees with the commenters' statutory interpretation.

CAA section 504(a) provides that each title V permit must include ''conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.'' [229] Major NSR requirements, as reflected in a SIP, may indeed be ''applicable requirements'' covered by this statutory provision, but only if they are applicable to emission units at a stationary source. Thus, the fact that major NSR requirements are contained within a SIP does not resolve the matter at hand. At issue here is whether the title V permitting process is the appropriate forum to resolve questions about applicability, particularly in situations in which questions regarding applicability have already been conclusively resolved through the proper title I channels—an adjudication involving the issuance of an NSR permit. As explained in section III.C of this preamble, the EPA interprets the various statutory provisions to mean that if an NSR permit is issued with public notice and the opportunity for comment and judicial review, that NSR permit establishes all relevant NSR-related requirements of the SIP (whether major or minor NSR) that apply to the construction or modification of the source.

Adverse commenters contested this core interpretation, arguing that nothing in the CAA or the Federal NSR regulations makes a State's issuance of a minor NSR permit dispositive of whether major NSR requirements apply to a particular project. Commenters argued that major NSR requirements are self-executing and are not affected by issuance of a minor NSR permit. Thus, according to commenters, even if a minor NSR permit is issued, major NSR requirements in a SIP may still be ''applicable requirements'' with which a title V permit must assure compliance. Commenters asserted that minor NSR permits cannot define the applicable requirements of the SIP, because doing so would amount to a revision of the SIP without approval into the SIP.[230]

The EPA disagrees. Statutory silence on this particular topic does not support the commenters' position.[231] Rather, as explained in section III.C of this preamble, the best reading of the multiple statutory provisions at issue, in light of the structure and purpose of title V and of the CAA as a whole, is that the permitting mechanisms approved by the EPA into individual SIPs are the primary forums for determining and conclusively establishing which NSR-related requirements of the SIP are applicable to a particular construction project. Decisions that are made through—and could be challenged through—those title I adjudications should not be subject to further rounds of adjudication and substantive scrutiny in the title V process each time an operating permit is issued or renewed. These title I permitting decisions, including the decision that a minor NSR permit, rather than a major NSR permit, is required for a construction project, do

[225] The January 2024 Proposed Rule solicited comment on another alternative approach, which would have involved using title V to review questions related to major NSR applicability in situations in which NSR and title V permits were issued concurrently (or within a short period of time). This alternative was essentially a combination of the other two alternative approaches discussed in the January 2024 Proposed Rule. The EPA is not finalizing that combined alternative (or other combinations of alternatives requested by commenters) for the same reasons the Agency is not finalizing the individual alternative approaches.

[226] See section 3.5.2 of the RTC.

[227] See section 3.5.2 of the RTC. This line of reasoning, based on certain statements made when the EPA promulgated the part 70 rules, featured in the Tenth Circuit's interpretation of the prior regulatory definition of ''applicable requirement.'' *See Sierra Club,* 964 F.3d at 893–95.

[228] Thus, much of the general opposition to this rule may be more accurately understood to reflect opposition to this specific element of the rule. See section 3.5.2 of the RTC. Additionally, as noted in section III.B.4 of this preamble, this topic was the focus of the Tenth Circuit's adverse decision concerning the EPA's former regulations. *See Sierra Club,* 964 F.3d at 893–95.

[229] 42 U.S.C. 7661c(a). CAA section 502(f) adds little of substance beyond the requirements of CAA section 504(a) and merely affirms that requirements similar to section 504(a) must be met for a State to receive partial approval of its operating permit program (in advance of full program approval). *See* 42 U.S.C. 7661a(f). Additionally, CAA section 502(a) provides: ''Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.'' 42 U.S.C. 7661a(a). To the extent this provision is relevant, it supports the EPA's position regarding the separation of title I and title V obligations. Using the title V process to reevaluate and change an NSR applicability determination that was finalized prior to construction could ''alter the applicable requirement of this chapter that a permit be obtained before construction or modification.'' *Id.*

[230] See section 3.5.2 of the RTC.

[231] This statutory silence is not unique to the relationship between minor NSR and major NSR permitting requirements. The CAA does not include express language indicating that issuance of a minor NSR permit is dispositive of whether major NSR requirements apply to a particular project. But the CAA similarly does not include express language indicating that issuance of an NSPS or NESHAP regulation, or approval of a SIP, is dispositive of whether the promulgated or approved regulations satisfy the underlying CAA criteria associated with NSPS, NESHAP, or SIP regulations. It is nonetheless consistent with the best reading of the statute for the EPA determine that such decisions—similar to decisions to issue a minor NSR permit—are dispositive for purposes of determining the ''applicable requirements'' for title V permitting. As explained elsewhere in this preamble, this title V-based interpretation does not mean such decisions are dispositive in all contexts, and interested parties may use the appropriate title I-based oversight tools to review and, if necessary, challenge such decisions (whether they involve the issuance of a minor NSR permit, the promulgation of NSPS or NESHAP, or the approval of SIP regulations).

not impermissibly revise the SIP, but rather conclusively establish and define which existing SIP requirements are applicable and how they apply to a given project.

Adverse commenters also argued that determining which requirements are applicable to a source is a core purpose and function of the title V program, as reflected in the legislative history and statements made by the EPA when promulgating the initial part 70 regulations.[232] The EPA acknowledges that identifying which CAA requirements apply to a source (*i.e.,* which requirements must be included in the title V permit) is a key function of the title V permitting process. This is necessary to fulfill the statutory requirement that title V permits assure compliance with all applicable requirements.[233] However, to satisfy this obligation to identify all applicable requirements, it is only necessary and appropriate to use title V to substantively address questions regarding applicability if such questions require further site-specific factual analysis because such questions have not already been resolved by the underlying applicable requirement itself. In this respect, NSR applicability questions should be treated no differently from questions related to the applicability of different types of CAA requirements.

For example, in most cases, it would be appropriate to use the title V permitting process to determine whether (or which specific requirements within) a generally applicable NSPS, NESHAP, or SIP requirement applies to a particular source or piece of equipment. Likewise, title V could be used to address whether minor or major NSR requirements are ''applicable requirements'' that must be included in a title V permit if such a decision had not already been conclusively established through adjudication during a title I permitting process.

By contrast, if the applicability of a SIP requirement is established on the face of the SIP itself (*e.g.,* in a source-specific SIP provision established through rulemaking), the EPA would not substantively reevaluate this question through title V. If a minor NSR permit has been issued following public notice and the opportunity for comment and judicial review, major NSR applicability questions are similar to this example. That is, if an NSR applicability determination has already been made through the title I adjudication process (*e.g.,* if a State decides that major NSR does not apply to a new or modified source and therefore issues a minor NSR permit, and the EPA and the public have an opportunity to contest that decision) that adjudication conclusively establishes the relevant requirements of the SIP that are applicable to the source or project. Any further action by the EPA through the title V adjudication process would involve reconsidering that final title I adjudication relevant to applicability. That would be inconsistent with how the EPA treats applicability questions that are established by rulemaking under other CAA programs. Overall, the EPA considers it more consistent with the structure of the CAA—specifically, Congress's design of the relationship between title V and other CAA programs—and better policy to afford NSR applicability decisions made through a title I-based adjudication the same finality as applicability decisions under other CAA programs that are established by rulemaking. Title V does not provide a second opportunity to adjudicate such questions.

The EPA's approach ensures that title V permits function consistently not only as to NSR requirements and other types of CAA requirements, but also as to different types of substantive NSR questions. Despite some differences between questions regarding NSR permit content and questions regarding NSR applicability, these two types of questions are fundamentally similar and functionally intertwined. They both involve fact-specific decisions about which specific requirements are necessary to implement the general SIP requirements related to NSR, and both of these decisions are made contemporaneously through a dedicated title I process.

SIPs contain general criteria and thresholds for determining the applicability of different NSR-related SIP requirements and for defining what those requirements must entail. Determining which specific requirements (*e.g.,* emission limits) apply to individual emission units requires adjudication through a fact-specific permitting exercise. When a permitting authority authorizes construction by issuing either a minor NSR permit or major NSR permit, it decides which NSR-related SIP requirements are applicable to different aspects of the project on a pollutant-by-pollutant basis. The resulting NSR permit might include PSD requirements (*e.g.,* BACT) for some pollutants, NNSR requirements (*e.g.,* LAER) for other pollutants, and/or minor NSR requirements for other pollutants. In this manner, within a single NSR permit action, questions about the applicability of different NSR requirements are inextricably linked with questions about the content of the NSR permit (*i.e.,* the resulting emission limits). Further, questions about NSR permit content and NSR applicability are fundamentally similar because both questions address whether permit limits are set at a level stringent enough to satisfy the relevant general SIP requirements and both questions require a highly technical application of general SIP criteria to specific circumstances at the source.[234]

If an NSR applicability determination has already been adjudicated through the NSR process and a minor NSR permit is issued, any further action through title V related to major NSR applicability would likely require changes to emission limits and other applicable requirements established through that NSR process (since major NSR requirements are generally more stringent than minor NSR requirements). Using title V to reevaluate NSR applicability questions would inherently upset not only the NSR applicability decisions, but also NSR permit content decisions. The EPA does not view this result as consistent with the purpose of title V.

In summary, the NSR permitting process involves a merger of two concepts that are typically separate under other CAA programs: (i) developing emission limitations and standards, and (ii) determining which limitations are applicable to an individual source. In general, title V was designed for the latter, not the former. But if both steps occur in NSR through the same final adjudication, there is no need to adjudicate these matters again in title V. Once a title I-based adjudication is completed and a final NSR permit is issued, the limitations and other terms of that permit establish all relevant NSR-related requirements of the SIP (whether major or minor NSR) that apply to the construction or modification of the source. The terms of that NSR permit should be incorporated into the title V permit without further review, meaning no further review of that permit's content or of the decision to include minor NSR requirements, as opposed to major NSR requirements, within the permit.

[232] See section 3.3 of the RTC.

[233] 42 U.S.C. 7661c(a).

[234] For example, questions whether (i) an emission limit that purports to satisfy BACT should instead be made more stringent to satisfy BACT are similar to questions whether (ii) an emission limit that purports to satisfy minor NSR requirements should instead be made more stringent to satisfy BACT.

c. Other Preconditions Associated With the Issuance of an NSR Permit

Permitting authorities satisfy other types of NSR requirements in a SIP when issuing NSR permits. One requirement that frequently arises in the context of title V petitions involves determining that the new source or modification will not cause or contribute to a violation of the NAAQS. To satisfy this requirement, the State must undertake a fact-specific analysis through the NSR permitting process. This analysis may involve atmospheric dispersion modeling that may result in the imposition of additional permit terms that restrict emissions to protect the NAAQS.[235] In all cases, the NSR permitting process is designed to ensure that the NSR permit ultimately contains specific conditions as necessary to satisfy the NSR SIP requirement. Similar principles hold true for a variety of other substantive NSR requirements in SIPs, including a variety of requirements that are unique to NNSR.

Overall, substantive issues concerning NSR permit content, NSR applicability, and other NSR requirements are fundamentally similar. Each of these decisions requires a State to derive specific requirements for an individual source from general criteria in the NSR portion of the SIP, such as requirements to include limits reflecting certain technology-based criteria, to issue major NSR permits to projects meeting certain applicability criteria, or to ensure that permits meet certain criteria relevant to the NAAQS. Each of these determinations involve relatively complex, fact-specific decision making, which occurs during the NSR permitting process. Once that process concludes, the State issues an NSR permit that contains these source-specific applicable requirements of the SIP for the construction project being authorized. Thus, under the EPA's approach, all types of different NSR-related issues associated with authorizing construction are generally treated the same for purposes of title V review. The merit and validity of these substantive requirements are subject to review and correction through the available mechanisms for appeal of the NSR permit, and need not be further reviewed by a State permitting authority or the EPA through title V.

Procedural requirements associated with the issuance of NSR permits are also not directly reviewable through title V for reasons distinct from the interpretation of ''applicable requirements'' at issue in this rule. Under the statute and the EPA's existing regulations, the Agency can object to a title V permit that does not comply with ''applicable requirements'' of the CAA or requirements of part 70, including procedural requirements of part 70.[236] Procedural requirements associated with NSR permit issuance are not ''applicable requirements'' for title V purposes because they do not ''apply to emissions units at a part 70 source.'' [237] Rather, they dictate the behavior of permitting authorities in issuing NSR permits. Procedural requirements associated with NSR permit issuance are also not part 70 requirements because they are not related to title V or the part 70 regulations governing the issuance of a specific title V permit.[238] Thus, alleged violations of procedural requirements associated with NSR permit issuance would not provide an independent basis for the EPA to object to a title V permit that incorporates such an NSR permit.[239] Nonetheless, although procedural flaws with the issuance of an NSR permit would not provide a direct basis for the EPA to object to a title V permit, such procedural issues could impact whether other more substantive NSR issues should be reviewed through the title V process. See section III.D.5.b of this preamble for further information.

4. Different Procedures for Incorporating NSR Permits Into Title V Permits

In most cases, the EPA's approach applies in the same way regardless of the procedures by which a State permitting authority incorporates the terms of an NSR permit into a title V permit. In other words, as long as a permitting authority formally issues an NSR permit that has the force of law [240]—and regardless of whether the NSR and title V permits are issued sequentially, concurrently, or even in the same physical document—the unique title V oversight tools may not be used to review the NSR-related decision making underlying that NSR permit.

The EPA's approach is most straightforward if an NSR permit is issued in final form prior to the initiation of any title V permitting action or if an NSR permit has already been included in a previous version of a title V permit that is up for renewal. This is the default approach, as the EPA's regulations allow regulated entities subject to major NSR preconstruction permitting requirements to submit a title V permit application within one year after beginning operation, in most cases.[241] Additionally, if new requirements become applicable to a source, including by virtue of a change to the source (*e.g.,* minor NSR requirements), the source's title V permit would need to be reopened to include such requirements within 18 months or at the next permit renewal, depending on the amount of time left before the title V permit expires.[242] Regardless of the specific timing, it should be straightforward in these instances to simply incorporate the applicable requirements from the previously finalized NSR permit into the title V permit.

Not all NSR and title V permits are processed sequentially; some are issued concurrently. It is important to recognize that the NSR and title V permitting programs are based on distinct Federal and State statutory and regulatory authorities and feature significant differences in both their substantive and procedural requirements. However, the two programs feature some overlapping public participation requirements, including requirements for public notice, the opportunity for public comment, and the opportunity for judicial review. Accordingly, some State permitting authorities choose to streamline permit issuance by conducting one process that satisfies both sets of overlapping requirements.

[235] Not all NSR-based SIP requirements related to the NAAQS result in the imposition of requirements that apply to emission units at a source. As discussed previously, only those requirements that ''apply to emissions units in a part 70 source'' qualify as ''applicable requirements'' for title V purposes. 40 CFR 70.2; *see* 40 CFR 71.2.

[236] *See* 42 U.S.C. 7661d(b); 40 CFR 70.8(c)(1), 70.12(a)(2), (a)(2)(ii) through (iv).

[237] 40 CFR 70.2.

[238] Notably, the EPA's authority to object under CAA section 505(b) extends only to the particular proposed title V permit before the Agency for review; the CAA does not provide for the EPA's objection to NSR permits. The references within CAA section 505(b) to ''any permit,'' ''the proposed permit,'' ''a permit,'' ''the permit,'' etc. apply to the title V permit that a permitting authority proposes to issue and transmits to the EPA under CAA section 505(a)(1). 42 U.S.C. 7661d(a), (b)(1), (b)(2); *see also* 40 CFR 70.8(c)(1), (d) (similar language and cross-references as the statute), 70.12(a)(1) (requirement that petitioners identify the specific title V permit action on which the petition is based), 70.12(a)(2) (petition claims must be based on alleged deficiencies in the ''permit process'' associated with the title V permit being petitioned).

[239] *See Century Aluminum Order* at 19–20.

[240] Because it is the NSR permit that establishes the ''applicable requirements'' for title V purposes, the EPA has long explained that title V permits do not supersede title I permits, which must remain in effect to authorize construction and/or operations, even after the terms of a title I permit are incorporated into a title V permit. *See, e.g.,* 69 FR 10167, 10170 (March 4, 2004); 66 FR 64039, 64040 (December 11, 2001); Letter from John S. Seitz, EPA, to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO, Encl. A at 4 (May 20, 1999).

[241] 40 CFR 70.5(a)(1)(ii); 40 CFR 71.5(a)(1)(ii).

[242] 40 CFR 70.7(f)(1)(i); 40 CFR 71.1(f)(1)(i).

Based on the EPA's experience, the mechanisms that State permitting authorities use to streamline the permitting processes vary considerably across the Nation. Different streamlining mechanisms have received various labels, including ''combined,'' ''merged,'' or ''unified'' permits.[243] This preamble addresses three of the more common forms of streamlining. Some permitting authorities streamline NSR and title V permit issuance by processing the two permits concurrently, subject to overlapping public participation opportunities.[244] There are two basic variations of concurrent permit issuance. First, the permitting authority could concurrently issue the NSR permit as a standalone document containing only NSR permit terms and also issue a title V permit containing all existing title V permit terms and the new NSR permit terms. Second, the permitting authority could issue one permit document that contains both the NSR permit and title V permit conditions. As an alternative to concurrent permit issuance, some permitting authorities employ a third mechanism, whereby the NSR permit is first issued with enhanced procedural and substantive requirements (based on title V requirements), then the NSR permit requirements are subsequently incorporated into a title V permit through an administrative amendment process that does not require public participation.

a. Concurrent Permit Issuance

In the January 2024 Proposed Rule, the EPA solicited comment on an alternative approach that would have treated permits processed under the first two streamlining mechanisms—NSR permits processed concurrently with, or in the same document as, title V permits—differently than NSR and title V permits that are processed sequentially. Public comments almost universally opposed this alternative.[245] Within the January 2024 Proposed Rule, the EPA noted that it was not clear what legal basis would support such differential treatment based exclusively on the timing of NSR and title V permit issuance. One set of commenters attempted to offer ''legal support'' for this alternative, but those comments did not actually identify any statutory or regulatory basis for differentiating these situations or rebut the EPA's legal analysis presented in the January 2024 Proposed Rule (explained further below). Therefore, the EPA is not moving forward with this alternative.

As discussed earlier in this preamble, the relationship between NSR and title V permits is based on the EPA's interpretation of the statutory and regulatory term ''applicable requirements'' of the CAA, which reflects requirements that are conclusively established under other non-title V CAA programs. This concept is time-neutral, such that requirements that are properly established under another CAA program—regardless of when they are established—define the applicable requirements that must be included in a title V permit. To the extent the EPA has addressed timing considerations, it has been to ensure that the definition of ''applicable requirement'' is overinclusive with respect to requirements that have already been promulgated but are not yet effective.[246] The alternative approach (that the EPA is not finalizing) would have entailed the opposite position, excluding recent NSR permitting decisions from establishing applicable requirements just because they were undertaken more recently. That approach would conflict with the EPA's treatment of applicable requirements under all other types of CAA programs. The EPA does not consider such an approach compatible with the structure and purpose of title V.[247]

As noted earlier in this subsection, there are two approaches to concurrent or contemporaneous permit issuance. The first approach—featuring separate NSR and title V permit documents issued at or around the same time—is undoubtedly the clearest of the various streamlining approaches. There can be no mistaking that there are two legally distinct permit actions, and it is simple to identify which requirements are based on the NSR regulations (and thus not subject to additional review through title V).[248]

The second approach—featuring a single combined NSR and title V permit document—is also viable, provided the underlying authority for the NSR aspects of the permit document are readily ascertainable from the permit(s) and permit record(s).[249] As explained in detail in several petition orders, even if NSR and title V permit authorizations are contained within one permit document, such a permit action actually reflects two legally distinct permit actions by the State: (i) a preconstruction permit issued under the EPA-approved title I SIP regulations governing NSR, and (ii) an operating permit under EPA-approved part 70 regulations governing title V.[250] Again, NSR permits and title V permits are based on differing statutory and regulatory schemes, and although the two programs feature similarities, they also feature important substantive and procedural differences. A permitting authority's decision to increase administrative efficiency by issuing a single permit document to satisfy the legal requirements of two distinct permitting programs does not alter the applicability of requirements associated with each respective program. For example, substantive requirements unique to NSR would not be applied to establish or evaluate non-NSR-based title V permit terms. Likewise, procedural requirements unique to title V (including the EPA's objection

[243] The EPA considers it more appropriate to refer to the results of such streamlining as a combined ''permit,'' as opposed to a combined ''program.'' This is because, although a single permit document may be used to satisfy both NSR and title V permitting requirements, the requirements of the NSR and title V programs are legally distinct. *See Riverview Order* at 25–26.

[244] This process is similar to another mechanism for permit streamlining (not directly implicated by this rulemaking), under which a permitting authority may consolidate two procedures associated with title V permit issuance: the public's review of a draft permit and the EPA's review of a proposed permit. *See* 40 CFR 70.8(a)(1)(ii).

[245] See section 3.5.4 of the RTC. One comment expressed support for a version of this alternative allowing the EPA to review NSR issues for up to five years, based on principles related to the statute of limitations. Another set of comments opposed this alternative but nonetheless characterized the alternative as preferable to the EPA's existing approach. The January 2024 Proposed Rule solicited comment on another alternative approach, which would have involved using title V to review questions related to major NSR applicability in situations in which NSR and title V permits were issued concurrently (or within a short period of time). This alternative was essentially a combination of the other two alternative approaches discussed in the January 2024 Proposed Rule. The EPA is not finalizing that combined alternative (or other combinations of alternatives requested by commenters) for the same reasons the Agency is not finalizing the individual alternative approaches.

[246] *See* 40 CFR 70.2 (definition of ''applicable requirement'').

[247] Commenters arguing against the EPA's time-neutral approach provided little support beyond a recitation of the Agency's previous statements indicating a reluctance to use title V to review long-past NSR decisions (summarized in section III.A.2 of this preamble). Neither those prior EPA statements nor these adverse comments explain how such a time-dependent approach would work within the statutory or regulatory provisions related to applicable requirements. Additionally, one of the commenters arguing against the EPA's time-neutral approach appeared to concede that the relevant CAA requirements are time-neutral. Most other commenters who addressed this issue supported the EPA's time-neutral approach.

[248] *See Humboldt Order* at 10–12, *Nucor Convent Order* at 20; *Commonwealth Order* at 13–14; *South Louisiana Methanol Order* at 9; *SSS/WP Order* at 14–15.

[249] *See* 40 CFR 70.6(a)(1)(i).

[250] *See Apache Order* at 22–24; *South32 Hermosa Order* at 10–11; *SRP Coolidge Order* at 12–14; *Waelz Order* at 13–15; *Riverview Order* at 24–28; *Yuhuang II Order* at 7–8; *Big River Steel Order* at 11–12.

authority and public petition opportunity, among others) would not be extended to review substantive elements of the permit action unique to the NSR permitting process. The EPA's objection authority, and the public's ability to petition the Agency to object, are confined by the CAA to title V permits.[251] Combining the procedures by which a permitting authority issues NSR and title V permits does not alter this basic legal principle. Commenters provided no arguments to rebut this concept.

One set of commenters suggested that potentially unclear boundaries between the NSR and title V aspects of combined permits would present a legal basis for reviewing NSR issues through title V.[252] As explained in the January 2024 Proposed Rule, this would only be true in limited situations. Again, the fundamental legal underpinning of the EPA's approach is that once the NSR-related applicable requirements of the SIP are conclusively determined through a title I permitting process that features public notice and the opportunity for comment and judicial review, the Agency's title V oversight tools will not be used to substantively reevaluate those title I decisions. As relevant to concurrently issued NSR and title V permits, two qualifications arise from these principles.

First, NSR permits must be finalized by the time the title V permit is finalized to establish the ''applicable requirements'' for title V purposes.[253] In the EPA's experience, this has not been an issue to date, and the Agency does not anticipate this will be an issue moving forward. From the EPA's perspective, the NSR-related aspects of a combined permit (*i.e.,* the preconstruction permit authorization) could be finalized before the title V permit is issued, or even before the proposed title V permit is provided to the Agency for review.

Second, it must be reasonably clear that there are separate legal authorizations taking place (a preconstruction permit under title I, and an operating permit under title V), both in general and with respect to specific permit requirements. The EPA encourages permitting authorities to be clear about the nature of (and the legal authority underlying) combined permits in the public notice announcing such permit action, other portions of the permit record available for public review, and the terms of the permit(s).[254] Differentiating between individual NSR-based and title V-based permit terms within a combined permit should be straightforward, as all title V permits ''shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.'' [255] Thus, any NSR-related terms should be readily distinguishable from any non-NSR-related terms (or any title V-related terms related to monitoring and compliance assurance). The substance of appropriately designated NSR-based permit terms may not be subject to additional scrutiny through the unique title V oversight tools.

As acknowledged in the January 2024 Proposed Rule, it is possible that if NSR and title V permit documents have been merged to such an extent that it is impossible to legally distinguish the NSR permit action from the title V permit action, it may not be possible for the EPA to conclude that a title I permit has established all NSR-related requirements of the SIP and, therefore, it may be necessary to use the title V process to review whether the NSR-related requirements of the SIP are included in the title V permit. The EPA does not expect this to occur often.

Commenters raised various other concerns regarding the public's and the EPA's ability to effectively and efficiently participate in combined permitting procedures, including concerns regarding the increased volume of material to review and the increased potential for confusion.[256] Although the EPA appreciates these comments, on balance, the Agency considers the present approach to reflect the best policy. Among other considerations, as explained in the January 2024 Proposed Rule, the EPA's approach avoids disincentivizing or penalizing States from taking advantage of streamlined permit issuance procedures. As the EPA has recognized since the 1990s, these streamlined procedures are important tools to reduce administrative burdens and costs for permitting authorities, as well as delays for permittees, and are important tools to fulfill the CAA's directive to develop ''[a]dequate, streamlined, and reasonable procedures for expeditiously'' issuing permits.[257]

The EPA reiterates that policy considerations raised by public commenters are not directly relevant to the core legal underpinnings of this rulemaking. Based on those legal principles, the EPA finds that NSR permits issued concurrently with title V permits establish the NSR-related applicable requirements of a SIP in the same way that NSR permits issued sequentially with title V permits do. Therefore, the EPA's final rule applies the same approach regardless of whether NSR and title V permit actions are processed sequentially or concurrently.

b. ''Enhanced NSR'' and Title V Administrative Amendments

A third process used by some permitting authorities is often described as ''enhanced NSR.'' The EPA's regulations allow requirements from an NSR permit issued with certain enhancements to be incorporated into a title V permit via administrative amendment procedures (instead of significant modification or minor modification procedures, which would

[251] 42 U.S.C. 7661d(b).

[252] See section 3.5.4 of the RTC.

[253] Although the regulatory definition of ''applicable requirement'' includes ''requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates,'' 40 CFR 70.2, 71.2, this covers only future-effective requirements that have already been finalized at the time of title V permit issuance.

[254] *See, e.g.,* 40 CFR 70.7(h)(2), 70.7(a)(5), 70.6(a)(1)(i).

[255] 40 CFR 70.6(a)(1)(i). This requirement is important in all situations in which NSR permit terms (and permit terms derived from other CAA programs) are incorporated into a title V permit. However, it is especially important if NSR permit authorizations are issued within the same document as a title V permit in the first instance.

[256] See section 3.5.4 of the RTC. As explained in the preamble to the January 2024 Proposed Rule, the public participation process for combined NSR and title V permits is not particularly complicated. First, the public could comment on all portions of a combined permit document during the comment period associated with the combined permit document. Similarly, all portions of a combined permit document could be challenged in a state-court appeal of the final permit action. Beyond that, the available mechanisms to challenge different permitting decisions would diverge. The EPA's 45-day review of the proposed permit, and the subsequent public petition opportunity, would apply only to title V-related aspects of the permit action. Likewise, unique oversight tools associated with title I permits (*e.g.,* the EPA's authority under CAA section 167 to order a stop in work) would apply only to title I-related aspects of the permit action.

[257] 42 U.S.C. 7661a(b)(6); see *White Paper for Streamlined Development of Part 70 Permit Applications,* 14 (July 10, 1995) (''The EPA believes that the part 70 permit issuance process, involving as it does review by the permitting authority, public, and EPA, presents an excellent opportunity for the permitting authority to make appropriate revisions to a NSR permit contemporaneously with the issuance of the part 70 permit. The public participation procedures for issuance of a part 70 permit satisfy any procedural requirements of Federal law associated with any NSR permit revision. This parallel processing approach is also an excellent opportunity to minimize the administrative burden associated with such an exercise. By conducting a simultaneous revision to the NSR permit, the permitting authority would be revising the 'applicable NSR requirement' for purposes of determining what must be included in the part 70 permit.'').

otherwise be required). To qualify for this type of streamlined processing, the NSR permit would need to be issued following ''procedural requirements substantially equivalent to the requirements of [40 CFR] 70.7 and 70.8 . . . that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in [40 CFR] 70.6.'' [258]

The EPA proposed to remove this streamlining mechanism from the Agency's regulations for reasons that are only tangentially related to the core issues in this rulemaking. The EPA received comments from various groups—in particular, State permitting authorities that use or are interested in using this streamlining mechanism—which generally opposed the Agency's removal of this mechanism. Some comments proposed alternative approaches that would not require the EPA (or permitting authorities) to eliminate this procedure altogether.[259] After considering those comments, the EPA is severing this issue from this final rule and taking no further action related to ''enhanced NSR'' at this time.

The EPA's severance of the regulatory revisions associated with this topic does not affect the types of issues that would be subject to the Agency's review of permits issued following the ''enhanced NSR'' process. As explained in the January 2024 Proposed Rule, the EPA will not use the Agency's title V-based objection authority to address the substance of NSR permitting decisions made through this ''enhanced NSR'' process.

5. No Permit Issued Through a Title I Permitting Process With Public Notice and the Opportunity for Comment and Judicial Review

There may be certain limited situations in which the title V permitting process is the appropriate venue for addressing certain NSR permitting issues for a particular permittee. This conclusion is based on the same statutory and regulatory interpretations underlying situations in which the title V permitting process is not appropriate for addressing NSR permitting issues. In sum, as explained further in the following subsections, if applicable requirements are conclusively established under another CAA program, they are not substantively addressed again through title V. If applicable requirements are not conclusively established under another CAA program, however, they may be substantively addressed through title V to fulfill the statutory mandate that each title V permit assures compliance with all applicable requirements, including requirements of the SIP.[260]

a. No Title I NSR Permit Issued

Title I permits issued with public notice and the opportunity for comment and judicial review conclusively establish NSR-related ''applicable requirements'' of the SIP for title V purposes. But if a facility proceeds with construction without any title I-based preconstruction permit (or similar authorization), there is nothing to conclusively establish all relevant NSR-related applicable requirements of the SIP.[261] In this rare and limited situation, the title V process can, and should, be used to assure compliance with any relevant underlying NSR-related applicable requirements of the SIP. This is similar to how the title V process is used to define the specific requirements necessary to assure compliance with general requirements of other CAA programs that are not conclusively established through a separate rulemaking or adjudication (*e.g.,* permitting) process, as discussed in section II.F of this preamble.

This concept could result in the EPA using title V oversight authorities to review NSR issues in two limited situations. First, the EPA will continue to review substantive NSR issues in which no preconstruction permit is issued to authorize particular construction projects (sometimes called ''unpermitted projects''). In this case, a title V permit action may be the first and only permit action associated with the relevant construction activities, and the title V process can be used to ensure that any new or modified sources that do not obtain a preconstruction permit comply with all relevant NSR-related requirements of the SIP.[262]

Second, if a preconstruction permit is issued, but not issued under title I, such a permit would not establish the NSR requirements of the SIP that apply to an individual source. Issuance of a non-title I permit does not reflect a determination as to which of the NSR requirements in a SIP apply to construction and thus does not fulfill any NSR requirements in the SIP. In this rare and limited situation, it would be appropriate to use the title V permitting process to assess whether there are NSR requirements in the SIP that apply to a construction project covered by a non-title I permit. Moreover, it would be appropriate to use the title V permitting process to explore whether a preconstruction permit was issued under a title I-based authority, as opposed to a non-title I authority.[263]

Most public commenters did not contest this principle. However, public comments from two trade associations representing regulated entities suggested that even in situations in which no title I-based NSR permit had been issued, the EPA should not consider substantive NSR issues during the title V permitting process.[264] The basis for this suggestion is not clear to the EPA.[265] The EPA does not view such an approach to be consistent with the statutory requirement that each title V permit

[258] 40 CFR 70.7(d)(1)(v); *see* 40 CFR 71.7(d)(1)(v).

[259] See section 3.5.5 of the RTC.

[260] 42 U.S.C. 7661c(a).

[261] As discussed in more detail in the following subsection of this preamble, in addition to facility-specific NSR permits, permitting authorities also use other streamlined permitting mechanisms like general permits or permits by rule to authorize qualifying construction activities. Permitting authorities may also issue combined permit documents that serve as both a title I preconstruction authorization and a title V operating permit, as explained in section III.D.4.a of this preamble.

[262] *See Suncor West II Order* at 29–30*; West Elk Order* at 13 n.17*; Suncor East Order* at 45–48, 54–55 (reviewing NSR issues in which the State ''has not issued any title I NSR permits that would establish the NSR-related 'applicable requirements' of the SIP''); *SRP Agua Fria I Order* at 11 n.18 (reviewing NSR applicability issues in which no NSR permit had been issued); *SRP Desert Basin Order* at 12 n.20 (same); *BP Whiting II Order* at 13 n.24 (reviewing an NSR-related emission limit that was established in a title V, as opposed to an NSR, permit action). Additionally, within a portion of the EPA's 2017 *PacifiCorp-Hunter I Order* that was not challenged and not subject to the Tenth Circuit's partial vacatur, the EPA addressed the merits of a petition claim involving allegedly unpermitted modifications. *See PacifiCorp-Hunter I Order* at 26–31.

[263] For example, within a portion of the EPA's 2017 *PacifiCorp-Hunter I Order* that was not challenged and not subject to the Tenth Circuit's partial vacatur, the Agency addressed the merits of a petition claim involving an NSR permit that was allegedly not issued under EPA-approved SIP rules. *See PacifiCorp-Hunter I Order* at 24. Determining the authority underlying a preconstruction permit could also be relevant in other title V contexts. For example, States may issue preconstruction permits under State-only-enforceable laws (as opposed to Federally-approved and Federally-enforceable State laws, or Federal laws). Such State-only permit requirements may be included in title V permits, but they must be labeled as ''State-only'' or ''not Federally enforceable'' within a title V permit. 40 CFR 70.6(b)(2). Questions about the authority underlying such permits would therefore be relevant to determining whether 40 CFR 70.6(b)(2) was satisfied. *See, e.g., In the Matter of Phillips 66 Co., Borger Refinery,* Order on Petition No. VI–2017–16 at 8–10 (September 22, 2021).

[264] See section 3.5.6 of the RTC.

[265] This suggestion may have been based in part on language included in the Fifth Circuit's decision upholding the EPA's present approach, which referred to a situation in which a State's preconstruction permitting decision process results in ''no permit at all.'' *Env't Integrity Project,* 969 F.3d at 538. That section of the court's opinion (a background section) appears to reflect an incorrect summary of the EPA's views on this matter, and one that had no bearing on the ultimate disposition of that case.

assure compliance with all applicable requirements, including requirements of the SIP.[266] Thus, the EPA maintains that in situations in which no title I preconstruction permit (or equivalent) is issued to authorize a particular construction activity, questions about whether NSR-related requirements of the SIP should be included in the title V permit are properly subject to review through the title V permitting process.

b. Title I NSR Permit Issued Without Public Notice and the Opportunity for Comment and Judicial Review

Since 2017, when the EPA began implementing the approach codified in this rule, the Agency has provided the following qualification: only title I preconstruction permitting decisions that have been subject to public notice and the opportunity for comment and judicial review conclusively establish the applicable requirements of the SIP, thereby foreclosing further substantive review of those SIP requirements during the title V permitting process. Therefore, the EPA will continue to review substantive NSR issues in the rare and limited situations in which the underlying NSR permit was not issued following public notice and the opportunity for comment and judicial review.

This element of the EPA's approach garnered significant interest, concern, and opposition in public comments from permitting authorities and regulated entities.[267] Many commenters argued that the EPA lacks a legal foundation for differentiating between NSR permits that were issued with, or without, public notice and the opportunity for comment and judicial review. These commenters pointed out that the CAA does not require notice for all types of NSR permit actions, that the EPA has approved many SIP provisions that do not require notice for certain types of minor NSR permit actions, and that the Fifth Circuit's decision did not depend on this element. These commenters further argued that this distinction runs counter to the basic purpose of title V: to consolidate, but not substantively change, applicable requirements developed under other CAA programs.

The EPA considers this qualification to be an important element of the Agency's framework and the best reading of the statute. The EPA's approach is necessary to comply with the statutory directive that each title V permit assure compliance with NSR-related requirements of the SIP, while at the same time respecting the overarching structure of the CAA and the role of title V permits in relation to other CAA requirements—in particular, that Congress did not design title V as a vehicle to substantively reevaluate applicable requirements that are conclusively established in another CAA program.

As explained in more detail in section III.C of this preamble, the CAA requires that each title V permit contain conditions sufficient to assure compliance with all applicable requirements of the CAA.[268] The statute is clear that this includes requirements of the SIP, which would include NSR-related requirements that are applicable to a given construction activity. But the CAA does not further define the term ''applicable requirements'' or prescribe the circumstances in which it would or would not be appropriate for the EPA to consider the substantive adequacy of requirements established under other CAA programs in the context of title V. The EPA finds the best reading of the statute to be that if an applicable requirement is conclusively established outside of title V, title V may not be used to second-guess the substantive adequacy of that requirement. The next question—not directly answered by the statute—then becomes: what does it take to conclusively establish an applicable requirement, such that it may not be subject to further evaluation through title V?

For most CAA-based requirements, including NSPS, NESHAP, and many SIP requirements, the applicable requirements are conclusively established through a rulemaking process that involves public notice and comment and the opportunity for judicial review, and which, therefore, affords affected stakeholders the opportunity to contest such requirements at the time they are established. Once these requirements are established, the EPA's longstanding—and generally uncontested—position is that the substance of such requirements is not subject to further review through title V. As explained in section III.C.4.a of this preamble, for purposes of establishing ''applicable requirements'' for title V permitting, it is logical and appropriate to treat decisions that go through similar processes similarly. The approach codified herein—which is predicated on public notice and the opportunity for comment and judicial review during the NSR permitting process—aligns the treatment of requirements established for individual sources through adjudication during the NSR permitting process with applicable requirements established by regulation under other CAA programs, while preserving for adjudication in the title V process any questions that have not been conclusively established by rulemaking or adjudication.

The EPA acknowledges that this concept is more complicated for NSR-related requirements than for many other types of CAA requirements. As discussed in section III.C.3.a of this preamble, establishing NSR-related applicable requirements for a particular construction project involves a relatively unique two-step process.[269] This two-step framework is reflected in the EPA's longstanding regulatory structure (the first two items of the definition of ''applicable requirement'' in 40 CFR 70.2), as further clarified in the amendments in this rulemaking. First, each State's SIP includes broadly applicable NSR requirements that provide a framework for establishing more specific requirements at individual facilities. Second, the specific requirements that are applicable to a particular construction activity are established through adjudication during the NSR permitting process.

Some adverse public commenters focused on the second step, arguing that individual NSR permit actions may be fully final and effective preconstruction authorizations regardless of whether they feature public notice and the opportunity for comment and judicial review, especially if the EPA-approved SIP does not require such procedures for a particular type of permit action (*e.g.,* certain minor NSR permits).[270] The EPA does not dispute this point. In fact, the EPA's regulations confirm that the terms of an NSR permit reflect ''applicable requirements'' that must be included in a title V permit, regardless of the procedures through which an underlying NSR permit is issued.

The core issue addressed in this rulemaking is whether all NSR-related applicable requirements of the SIP—as referenced in CAA section 504(a) and reflected in item (i) of the regulatory definition of ''applicable

[266] 42 U.S.C. 7661c(a).

[267] See section 3.5.7 of the RTC.

[268] 42 U.S.C. 7661c(a).

[269] Although this process is somewhat unique to the NSR program, it is functionally similar to certain other (non-NSR) SIP requirements that are defined generally within the SIP, and which must be defined more specifically in a subsequent site-specific action. As explained in section II.F of this preamble, when the underlying applicable requirement itself (*i.e.,* the SIP) does not conclusively define such requirements, it is appropriate to use the title V process to define precisely how such general SIP requirements apply to a particular facility to assure compliance with the general requirements of the SIP.

[270] See section 3.5.7 of the RTC.

requirement''—have been definitively established through adjudication during the title I permitting process, such that they should not be further adjudicated through the title V permitting process. As explained throughout this preamble (as well as the January 2024 Proposed Rule preamble and prior title V petition orders), if an NSR permit is issued following public notice and the opportunity for comment and judicial review, this adjudication through the NSR permitting process provides a reasonable assurance that all NSR-related requirements of the SIP have been conclusively established, such that no further review of this question is necessary through a title V-based adjudication featuring similar participatory opportunities. But if NSR permitting decisions are not developed through a formal process that involves public notice and the opportunity for comment and judicial review, neither the EPA nor the public have any opportunity to consider, provide input on, or appeal whether all relevant NSR requirements of the SIP were properly established. In such a circumstance, it would be inappropriate to conclude, without any further substantive review, that a title V permit assures compliance with all NSR-related requirements of the SIP simply by incorporating the NSR permit. Put simply, this aspect of the EPA's framework acknowledges the possibility that NSR-related requirements of the SIP might not be included or satisfied within a title I permit if neither the EPA nor the public have an opportunity to participate, evaluate, and contest a title I preconstruction permit proceeding.

There is a spectrum of different procedures used by permitting authorities across the Nation to issue minor NSR permits in particular. These procedures range from no explicit authorization at all, to a generic permit authorization (*e.g.,* general permit or permit by rule), to a site-specific permit issued without any EPA or public involvement, to a site-specific permit issued following public notice and the opportunity for comment and judicial review. At one end of the spectrum—where no NSR preconstruction permit is issued at all—it would be unreasonable to conclude that all NSR-related applicable requirements of the SIP have been conclusively established. At the other end of the spectrum—where an NSR permit is issued following public notice and the opportunity for comment and judicial review—the EPA considers this sufficient to conclusively establish all NSR-related requirements of the SIP that apply to the construction activity at issue. Differentiating based on the opportunity (or lack thereof) to evaluate and challenge an NSR permit when it is issued is the most logical way to draw a line within this spectrum.

The EPA's approach to title V, as codified by this final rule, applies consistently across the Nation based on this single set of criteria. This is preferable to the approach advocated by some commenters, which would result in a fragmented and inconsistent approach to title V, varying according to the different procedural requirements that apply to the issuance of a particular type of NSR permit in a particular jurisdiction.[271]

The EPA's title V-focused framework applies uniformly based on the procedures actually followed when issuing a particular NSR permit, as opposed to the procedures required to be followed when issuing a particular NSR permit. Those requirements are not directly relevant to this rulemaking, as this rulemaking does not concern the statutory or regulatory requirements that dictate the procedures used to issue final and effective NSR permits. Rather, this rule concerns whether the title V permitting process should become a second opportunity to adjudicate the specific requirements for an individual source after they were already adjudicated and subject to review through a comparable process under title I.

A key premise underlying this rulemaking is that the title V permitting process was not designed by Congress as a mechanism to reevaluate NSR permitting decisions that establish the applicable requirements of the SIP for a particular construction project. Implicit in this concept is that there is a first opportunity for review when an NSR permit is issued. The approach advocated by some commenters would mean there is no opportunity for either the EPA or the public to review certain NSR permitting decisions, neither when the NSR permit issued nor when the title V permit is issued.[272] Again, the EPA views such an approach as inconsistent with the statutory mandate that each title V permit assure compliance with all NSR-related applicable requirements of the SIP.[273]

The EPA reiterates that many of the legal and policy justifications throughout section III.C of this preamble are premised on the availability of opportunities for the Agency and the public to review, consider, and challenge NSR decisions through title I permitting avenues at the time such decisions are made, as opposed to through the title V process. For example, the availability of title I permitting-based avenues for review and oversight of individual title I permitting decisions obviates the need to use title V-based oversight tools to address the same issues with respect to individual construction authorizations. Policy considerations, such as avoiding duplication and inefficiency, respecting the finality of NSR permitting decisions, and acknowledging regulated entities' need for certainty, are most relevant in situations in which an NSR permit has been subject to public notice and the opportunity for comment and judicial review.[274]

Some commenters argued that this element of the EPA's framework reflects a change in the Agency's approach.[275] The EPA disagrees; this is a longstanding element of the framework the Agency has consistently applied since 2017. Within the 2017 *PacifiCorp-Hunter I Order,* the EPA emphasized on five separate occasions that the Agency's decision not to review NSR issues within that title V petition response—and several of the legal and policy rationales supporting this position—were based on the facts present there: ''where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available.'' [276] The EPA has emphasized the same qualifications in essentially every one of the dozens of relevant title V petition orders to follow. On the limited occasions when the EPA has confronted NSR permits that were not issued with public notice and the opportunity for comment and judicial review, the Agency has been explicit that this provided a basis for the Agency to review certain underlying NSR issues.[277]

This precondition or qualification continues to apply to all EPA determinations moving forward,

[271] See section 3.5.7 of the RTC.

[272] See section 3.5.7 of the RTC.

[273] 42 U.S.C. 7661c(a).

[274] Some public commenters noted that several of the EPA's policy arguments—such as those outlining the difficulties in using the title V permitting process to consider or resolve complex NSR issues—apply equally well regardless of whether an NSR permit is issued with or without public notice. The EPA agrees, but this does not in and of itself represent the basis for changing the Agency's approach, which is based on the more decisive legal and policy considerations discussed in this section of the preamble. See section 3.5.7 of the RTC.

[275] See section 3.5.7 of the RTC.

[276] *PacifiCorp-Hunter I Order* at 11 n.21; *see id.* at 16, 17, 18, 19.

[277] *See, e.g., TPC Houston Order* at 42 n.243; *ITC Pasadena Order* at 24; *Coyote Station Order* at 12–13.

regardless of when the underlying NSR permit was issued. Some public commenters argued that this element of the EPA's approach should not be used as a basis to review NSR decisions lacking notice that predated this rule.[278] In other words, commenters argued that this element of the rule should only be applied prospectively to forthcoming NSR permits issued without notice, not retroactively to NSR permits issued without notice in the past. The EPA does not agree with that suggestion, which would be inconsistent with the approaches the EPA has applied for several decades. It would have been reasonable for outside parties to expect that the title V process could be used to review any past NSR permits that were not issued with notice and the opportunity for comment and judicial review, either based on the EPA's pre-2017 policies (which ostensibly allowed review of all NSR permit actions), or based on the approach the EPA has applied consistently since 2017 (described within this section of the preamble).

Many commenters addressed the EPA's suggestion in the January 2024 Proposed Rule that this element of the Agency's framework provides an ''incentive'' for permitting authorities to provide public notice on certain minor NSR permit actions that would not otherwise involve notice.[279] These commenters argued that the EPA was effectively requiring permitting authorities to uniformly apply major NSR notice and comment procedures to all types of NSR permit actions. Commenters asserted that such a requirement is inconsistent with cooperative federalism, statutory requirements, and prior EPA SIP approvals, all of which allow a more tailored, flexible approach to minor NSR permitting procedures. Essentially, commenters took the position that if the EPA wanted to mandate additional public procedures for minor NSR permits, it should not attempt to do so through this title V rulemaking but instead should pursue such changes through the title I rulemaking process, including SIP revisions if needed.

The EPA disagrees with this characterization of the effect of this rulemaking. The EPA reiterates that, by codifying text in parts 70 and 71 referencing ''public notice and the opportunity for public comment and judicial review'' of NSR permits, this rule simply establishes a qualification, or precondition, relevant to whether underlying NSR decisions are insulated from, or potentially subject to, additional review through title V. These regulatory revisions will not impose any binding procedural requirements governing a permitting authority's issuance of NSR permits. Rather, such procedural requirements are found in the relevant statutory and regulatory authorities governing NSR and the SIP regulations that implement them.[280] The EPA further clarifies that it is not including this qualification in order to incentivize States to provide public notice on a broader range of NSR permits than would otherwise be required under the relevant title I procedural requirements. The EPA agrees with commenters that the appropriate venue to address the public participation requirements governing minor NSR is through a dedicated title I action. The EPA intends to address such requirements separately from this rulemaking.[281]

Comments from some State permitting authorities and regulated entities raised concerns about the potential for increased costs and diversion of resources if they were to provide public participation for, *e.g.,* all minor NSR permit actions.[282] The EPA appreciates those concerns and reiterates that this rule neither requires nor encourages permitting authorities to provide notice on more NSR permit actions than would otherwise be required. This programmatic decision is one that each permitting authority must make based on its own assessment of the associated legal requirements, benefits, and costs. Although it is possible that the title V permitting process may be used to evaluate NSR-related requirements that originate without a formal title I process involving public notice, the EPA expects that as a practical matter, this will occur infrequently. From 2017 to 2025, the EPA has confronted NSR-related issues in title V petitions on more than 30 occasions, but the lack of notice on an NSR permit has only provided the determinative basis for the Agency' review of NSR-related issues in one order.[283] Overall, the EPA does not expect that this aspect of the Agency's framework will materially impact NSR permitting practices.

The EPA reiterates that the lack of notice on an NSR permit—whether required by the SIP or not—would not, in and of itself, present an independent basis for the Agency's objection to the title V permit.[284] Questions about the procedures used to issue NSR permits are only indirectly relevant to the EPA's review of title V permits or public petitions on title V petitions. Such questions may inform whether it is appropriate to use the title V process to review the substance of that NSR permit to ensure that the title V permit reflects, and assures compliance with, all relevant NSR applicable requirements of the SIP. Additionally, as noted in the January 2024 Proposed Rule, to the extent the public raises procedural issues in a title V petition, petitioners have the burden to demonstrate all claims within a title V petition, which would naturally include concerns related to NSR permit issuance procedures.[285] Permitting authorities, in turn, have an obligation to respond to all significant public comments.[286]

Several commenters (particularly State and local permitting authorities) requested that the EPA delay issuance of this rule until the Agency has provided additional guidance about the meaning of the phrase ''public notice and the opportunity for comment and judicial review.'' [287] The EPA need not resolve such issues within this rulemaking or delay issuance of this rulemaking. The EPA is developing a separate action that will more clearly define required public participation procedures for minor NSR permitting actions; the EPA considers that action to be the more appropriate place to address such questions. The EPA notes that questions about the meaning of this phrase have not arisen in the past nine years the Agency has implemented the approach codified in this rule. To the extent the EPA encounters future disputes about the proper format or content of public notice or the opportunity for comment

[278] See section 3.5.7 of the RTC.

[279] See section 3.5.7 of the RTC.

[280] *See, e.g.,* 42 U.S.C. 7475(a)(2); 40 CFR 51.161, 51.165(i), 51.166(q).

[281] *See* Minor New Source Review Program Air Permitting Public Participation Requirements for State Implementation Plans, 91 FR 41591 (July 7, 2026).

[282] See section 3.5.7 of the RTC.

[283] In the *TPC Houston Order,* the lack of notice provided the determinative basis for the EPA's review of NSR-related issues. *TPC Houston Order* at 42 n.243. In the *Coyote Station Order,* the lack of notice was but one of multiple independent reasons for why the underlying NSR issues were properly subject to review through title V. *Coyote Station Order* at 12–13. Additionally, in the *ITC Pasadena Order,* the EPA stated that the lack of notice associated with an initial NSR authorization would have provided a basis for the EPA to review certain NSR issues, but ultimately this basis for review was rendered moot by a subsequent NSR permit action that did include notice. *ITC Pasadena Order* at 24–26.

[284] As explained in section III.D.3.c of this preamble, procedural requirements associated with NSR permit issuance are neither ''applicable requirements'' for title V purposes (because they do not apply to emission units at a part 70 source) nor part 70 requirements (because they are not related to the issuance of a specific title V permit).

[285] 42 U.S.C. 7661d(b)(2); *see* 40 CFR 70.12(a)(2).

[286] 40 CFR 70.7(h)(6).

[287] See section 3.5.7 of the RTC.

or judicial review, the Agency will address those questions on a case-by-case basis.

Some commenters also requested clarification about how this aspect of the EPA's approach would be applied to particular situations.[288] The situation of most interest involved general permits and permits by rule—both of which are commonly utilized mechanisms in EPA-approved SIPs to streamline minor NSR authorizations. In nearly all situations of which the EPA is aware, when a general permit or permit by rule is first developed, it goes through a process involving public notice and the opportunity for comment and judicial review. That process generally culminates in a general permit or permit by rule that includes criteria for determining what types of construction projects are eligible for authorization under the permit, as well as the substantive emission control requirements that apply to such projects, and that process also should involve an evaluation of other NSR-related requirements, such as the impact of projects on the NAAQS. Since the aforementioned NSR issues would have already gone through a process including EPA and public involvement, none of those issues would be subject to further review during the title V process. However, if construction at an individual facility is authorized using an existing general permit or permit by rule, the site-specific authorization typically does not involve public notice and the opportunity for comment and judicial review. As such, questions about whether a particular project qualified for authorization via a general permit or permit by rule, or instead whether that project may have triggered other NSR requirements within the SIP (*e.g.,* major NSR requirements), would be properly subject to review during the title V process.[289]

Similar concepts apply to other examples raised by commenters, including PAL permits [290] and NSR applicability determinations.[291] If NSR decisions are made following a title I process with public notice and the opportunity for comment and judicial review, such decisions conclusively establish all NSR-related applicable requirements of the SIP, for purposes of title V. Decisions made informally without public notice do not conclusively establish all NSR-related applicable requirements of the SIP, and therefore would potentially be subject to additional scrutiny through title V. The EPA will address such issues on a case-by-case basis if and when they arise.

6. Issues Involving Overlapping Title V and NSR Requirements

In the limited circumstances in which the requirements of another CAA program and the requirements of title V substantively overlap, such areas of overlap may be addressed through title V. The EPA will continue to review issues involving an overlap of title V and NSR requirements. The most notable example involves using title V to evaluate the sufficiency of monitoring and related compliance assurance requirements associated with more substantive NSR permit requirements. As the EPA explained in one title V petition order:

> Unlike the BACT determination claims discussed above, claims concerning whether a title V permit contains enforceable permit terms, supported by monitoring sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a PSD permit), are properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains ''enforceable emission limitations and standards'' supported by ''monitoring . . . requirements to assure compliance with the permit terms and conditions,'' 42 U.S.C. 7661c(a), (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits and standards that are included in a title V permit. Therefore, the EPA will address the merits of those portions of the Petition that challenge the enforceability of emission limits and the sufficiency of monitoring conditions in the Permit.[292]

Some comments from regulated entities appeared to question or dispute this overarching principle, either generally or with respect to monitoring requirements established in NSR permits.[293] This is a longstanding element of the EPA's implementation of title V, based squarely in the statute and case law from the D.C. Circuit.[294] The EPA is not changing the Agency's position regarding the review of monitoring and compliance assurance provisions in this rulemaking.

Additional comments from environmental and other interest groups argued that in cases in which the EPA determines that a title V permit lacks sufficient monitoring or is otherwise not enforceable as a practical matter, such a conclusion should extend beyond the title V permit and also affect substantive NSR issues.[295] Commenters specifically discussed this concept in the context of ''synthetic minor'' limits within NSR permits, which a facility may voluntarily accept to avoid triggering major NSR or other requirements. Such limits must be enforceable as both a legal and practical matter to effectively restrict emissions and avoid major NSR applicability. According to commenters, if the EPA concludes in the title V process that such a limit (as reflected in a title V permit) is not enforceable as a practical matter, this must necessarily entail an EPA conclusion that the limit was ineffective to avoid major NSR applicability, and thus that the facility is subject to major NSR requirements. The EPA disagrees, as explained on multiple occasions. The EPA's objection in such an instance would be limited to the relevant title V obligations related to monitoring and enforceability and would not directly affect any NSR permitting decisions.[296]

The EPA has also considered (and will continue to consider) other issues involving an explicit overlap between NSR and title V. Examples addressed to date include situations in which a State's SIP rules and part 70 program rules explicitly require consideration of NAAQS impacts in a title V permit proceeding,[297] in which both SIP and part 70 rules require an evaluation of the scope of the ''stationary source'' or ''major source'' subject to permitting requirements,[298] and in which SIP rules explicitly require consideration of adjustments to a PAL in a title V renewal permit action.[299]

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[288] *Id.*

[289] *See ITC Pasadena Order* at 24.

[290] Under a PAL, provided facility-wide emissions remain below the limit, future construction activities are not subject to major NSR permitting requirements. Public participation occurs when the PAL permit is issued. The EPA would not use title V to second-guess requirements or criteria within the PAL, or the effectiveness of the PAL to restrict major NSR applicability. However, there may be a limited subset of questions that are not conclusively resolved when the PAL is initially established, and which could be subject to review through title V.

[291] Although there is no formal regulatory mechanism for EPA to officially provide an ''applicability determination'' related to NSR requirements—especially in jurisdictions in which a State operates its own EPA-approved, SIP-based NSR program—EPA Regional offices and State permitting authorities occasionally provide such determinations by letter.

[292] *South Louisiana Methanol Order* at 10–11; *see SRP Coolidge Order* at 23 n.34; *ITC Pasadena Order* at 13–14; *Gulf Coast Growth Ventures Order* at 17–19; *ExxonMobil Baytown Chemical Order* at 20–21; *Yuhuang II Order* at 8; *see also, e.g., Big River Steel Order* at 17, 17 n.30, 19 n.32, 20; *PacifiCorp-Hunter I Order* at 16, 17, 18, 18 n.33, 19.

[293] See section 3.5.8 of the RTC.

[294] 42 U.S.C. 7661c(c); 40 CFR 70.6(c)(1); *Sierra Club,* 536 F.3d at 680.

[295] See section 3.5.2 of the RTC.

[296] *See ITC Pasadena Order* at 13–14; *Yuhuang II Order* at 7–8.

[297] *Suncor West II Order* at 29–30; *HighPoint Order* at 15–16; *DCP Platteville I Order* at 15–16; *Suncor East Order* at 53–54.

[298] *Coyote Station Order* at 12–13.

[299] *ExxonMobil Baytown Chemical Order* at 13–14.

Notably, the EPA's consideration of NSR-related issues within these past actions did not involve reevaluating or second-guessing the content of applicable requirements established in NSR permitting actions. Instead, the EPA's consideration of those issues was based either on unique requirements of title V (*e.g.,* to add supplemental monitoring to the requirements in underlying applicable requirements) or on directives within the SIP itself, which effectively provided a mandate to further define applicable requirements of the SIP through the title V process (instead of the NSR process). Thus, the limited situations in which the EPA uses the title V process to address NSR-related issues is wholly consistent with the Agency's position that, in general, the title V process may not be used to second-guess or alter substantive applicable requirements that are established through a title I permitting process with public notice and the opportunity for comment and judicial review.

E. Impacts of the EPA's Approach and Final Action

This rule is primarily procedural and does not impose any specific or direct requirements on any potentially affected stakeholders. Additionally, given that this rule merely codifies the EPA's existing policies and interpretations that have been in place since 2017, any effects associated with the Agency's approach will not arise from this regulatory action itself. The EPA's approach most directly affects title V permitting practices. The following subsections of this preamble explain how the EPA's approach interacts with NSR permitting practices and enforcement considerations, and how the Agency's approach is expected to impact various affected stakeholder groups, including the Agency, permitting authorities, regulated entities, and the public.

1. Interaction With NSR Permitting

Although this rulemaking addresses the intersection of the NSR and title V permitting programs, the EPA's approach only directly affects implementation of the title V permitting program. More specifically, this rulemaking only affects the extent to which the title V permitting process will be used to consider substantive NSR issues, in the context of ensuring that title V permits assure compliance with NSR-related requirements of the SIP.[300]

This final rule does not affect the independent validity or enforceability of NSR permit terms or the SIP (or FIP) requirements upon which they are based. As discussed throughout this preamble, if an NSR permit is issued following public notice and the opportunity for comment and judicial review, the terms and conditions of such a permit establish the NSR-related applicable requirements of the SIP (or FIP) for title V purposes. Although these permit terms should generally be incorporated into the title V permit without further substantive review, an EPA decision not to conduct that review in the title V process does not mean that the Agency agrees that the State action complies with NSR requirements. It merely indicates that a title V permit is not the appropriate venue to correct any deficiencies in the NSR permit. Thus, even if the EPA might find an error upon reviewing a preconstruction permitting decision made by the permitting authority, the terms of the NSR permit should be incorporated into the title V operating permit until such time that there is a final action to revise, reopen, suspend, revoke, reissue, terminate, or invalidate the preconstruction permit, such as a court order in a State court appeal or through an enforcement action.[301]

By the same token, if an NSR permit is not issued through a process that included public notice and the opportunity for comment and judicial review, this rule does not address whether such a permit is valid or enforceable in its own right. Rather, this rule only affects how such a permit is treated through title V. The terms of such a permit would still need to be included in the title V permit under item (2) of the EPA's regulatory definition of ''applicable requirement.'' However, any such permit terms (and underlying permit decisions) would not be sufficient to conclusively define the NSR-related ''applicable requirements'' of the SIP under item (1) of the EPA's regulatory definition. Therefore, questions about whether the title V permit assures compliance with all NSR-related of the SIP would be subject to review through the title V process under these circumstances. But that is the only consequence insofar as this rule is concerned. Any relevant requirements of the SIP remain fully enforceable, and the independent enforceability of any NSR permit issued without an opportunity for comment and judicial review would be determined on the basis of those SIP requirements.

Some commenters, challenging the EPA's approach, argued that it is inconsistent to treat substantive NSR questions differently in the context of title V than in other contexts (*e.g.,* title I permitting and enforcement contexts).[302] The EPA disagrees. The EPA's approach is the best way to reconcile the relevant statutory mandates with the intended purpose of the title V program and its relationship to other CAA programs—namely, that title V is designed to consolidate, but not to substantively reevaluate or change, underlying applicable requirements established in other CAA programs, including NSR. Given these title V-based constraints, it is appropriate for NSR questions to be treated differently in the context of title V than in other contexts that are more directly associated with the establishment or enforcement of NSR requirements.

2. Interaction With Enforcement

Comments from environmental and other interest groups argued that the EPA's approach will shift the pressure for handling NSR disputes away from the permitting process and towards the enforcement process.[303] The EPA does not necessarily agree, as there remains the opportunity for the Agency and the public to oversee NSR permits through the title I permitting process. Nonetheless, to the extent the EPA's framework shifts NSR oversight to the enforcement process, the Agency considers that an appropriate outcome given the text and structure of relevant statutory provisions and programs. As explained in section III.C.3.b of this preamble, the title I permitting and title I and III enforcement mechanisms are the specific tools that Congress provided for overseeing NSR permitting decisions.

Commenters expressed concern that in certain situations, the enforcement process may not be available (*e.g.,* due to a statute of limitations prohibiting certain types of enforcement or certain remedies, such as penalties, after a set number of years).[304] Commenters

[300] 42 U.S.C. 7661c(a).

[301] As explained previously, this approach is analogous to how the EPA treats potential defects in other types of applicable requirements, including (non-NSR) requirements of the SIP. For instance, even when the EPA has made a determination that a provision of a previously approved SIP is not in compliance with the CAA, the Agency will not object to a permit that includes that provision until there is final action to remove it from the SIP. *See, e.g., Piedmont Green Power Order* at 28–29. The EPA's lack of objection to the inclusion of that requirement in the title V permit does not indicate that the Agency agrees that it complies with the CAA or applicable regulations; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the SIP.

[302] See section 3.5.1 of the RTC.

[303] See section 3.6.1 of the RTC.

[304] *Id.*

expressed concern that there will be no available mechanisms to address allegations of noncompliance for construction activities that are decades old, given the EPA's approach codified in this rule. The EPA disagrees. Depending on the circumstances, such issues may still be redressable through enforcement, even in situations in which a statute of limitations may proscribe certain types of enforcement or certain remedies. To the extent such issues are not redressable because of the statute of limitations, that would be a function of Congress's decision to apply a statute of limitations to that circumstance rather than this final rule.

Various public commenters also expressed concerns regarding how the EPA's approach would itself affect the availability of enforcement.[305] The incorporation of the terms and conditions of an NSR permit into a title V permit does not, by itself, diminish the ability to enforce preconstruction permitting requirements. As explained throughout this preamble, the EPA's approach and regulatory changes are restricted to defining the ''applicable requirements'' of the SIP that must be included in a title V permit, in the narrow context of fulfilling the statutory obligation that title V permits include conditions sufficient to assure compliance with the SIP.[306] If a minor NSR permit is issued following notice and the opportunity for comment and judicial review, issuance of that minor NSR permit conclusively establishes which NSR-related requirements of the SIP must be included in the title V permit. This precludes further scrutiny of major NSR applicability questions using the EPA's title V oversight tools. But defining applicable requirements for title V purposes in this rule does not affect the use of title I-based oversight and enforcement tools to address questions related to major NSR applicability. However, as detailed in the following subsections, there are two situations in which enforcement of title I requirements could be impacted by a title V permit.

a. Permit Shields

Enforcement of NSR requirements could be affected by a title V ''permit shield'' imposed under CAA section 504(f) and 40 CFR 70.6(f) and 71.6(f). A permit shield, if part of an approved title V program and expressly included in a title V permit, may provide a sufficient defense from enforcement actions under certain circumstances.[307] This rule does not change the EPA's interpretation or enlarge the scope of a permit shield.

There are different types of permit shields under title V; two types are relevant here. First, a permitting authority can provide that compliance with the title V permit ''shall be deemed compliance with other [non-title V] applicable provisions,'' but only if ''the permit includes the applicable requirements of such provisions.'' [308] If a title V permit includes this type of permit shield and also incorporates the terms of an NSR permit, the permit shield would provide that compliance with the title V permit would be deemed compliance with the corresponding underlying applicable requirements reflected in the NSR permit. However, compliance with such a title V permit would not be deemed compliance with any other requirements that are not contained in the NSR permit. For example, if a source obtained a minor NSR permit for a project and the title V permit included this type of permit shield, compliance with the title V permit would not preclude an enforcement action alleging a violation of title I of the CAA for failure to obtain a major NSR permit.

Public commenters expressed concern that the EPA's regulatory changes in this rulemaking would effectively transform this first type of permit shield into a second type of permit shield against claims related to major NSR applicability.[309] The EPA disagrees. The first type of permit shield, by its terms, can only extend to the applicable requirements included and specifically identified in the title V permit, which would be the specific terms of the underlying NSR permit.[310] The CAA and the EPA's regulations expressly and unambiguously require additional action—a distinct, second type of permit shield—to shield a permittee against allegations concerning major NSR applicability during the enforcement process. Specifically, the statute and regulations provide that this shield is only available if the State, ''in acting on the [title V] permit application[,] makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.'' [311] In other words, this type of permit shield requires that the permitting authority make a written non-applicability determination during the title V permitting process and memorialize this determination within the title V permit record.

If a permitting authority chooses to include either type of title V permit shield, that decision would be made through the title V permitting process and based on title V authority. As such, the decision to provide such a permit shield would be subject to review and oversight through title V, including being subject to the EPA's objection authority and the public petition opportunity. Commenters on the January 2024 Proposed Rule questioned why this would be the case.[312] To clarify the EPA's view, the Agency could object to a permit based on a determination that the permit shield was improperly granted and should not be included in the title V permit. This decision would only directly affect the title V permit terms establishing the permit shield. However, such a decision might require the EPA to substantively evaluate underlying NSR requirements covered by the title V permit shield—particularly in situations in which the permit includes the second type of permit shield, which could shield the source from violation of NSR-related SIP requirements that are not included in the title V permit.

The EPA notes that permit shields are optional, voluntary elements of title V permits. If a source wishes to take advantage of the unique enforcement-related protections associated with a title V permit shield, it must accept some title V-based scrutiny over such a decision. The availability of these title V oversight tools is important because an express title V permit shield can effectively preclude independent enforcement of the underlying applicable requirements through the Federal court system under CAA sections 113 or 304. By including an express permit shield through title V, enforcement-based oversight of the underlying applicable requirements themselves is replaced by oversight through the title V permitting process,

[305] *Id.*

[306] 42 U.S.C. 7661c(a).

[307] ''A part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.'' 40 CFR 70.6(f)(2).

[308] 42 U.S.C. 7661c(f)(1); *see* 40 CFR 70.6(f)(1)(i) (''[T]he permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that: (i) Such applicable requirements are included and are specifically identified in the permit . . . .'').

[309] See section 3.6.1 of the RTC.

[310] 42 U.S.C. 7661c(f)(1); 40 CFR 70.6(f)(1)(i).

[311] 42 U.S.C. 7661c(f)(2); *see* 40 CFR 70.6(f)(1)(ii).

[312] See section 3.6.1 of the RTC.

which provides an alternative pathway to the Federal courts.[313]

b. Jurisdictional Bars to Enforcement

As the Seventh Circuit has explained: ''Title V itself reserves the EPA's ability to bring an enforcement action for violations of the CAA unless an express 'shield' on the face of the permit bars that action. This provision would hardly be necessary if the EPA was supposed to resolve all alleged violations of the CAA in the permitting process.'' [314] However, even absent an express permit shield, other circuit courts of appeal have barred enforcement actions that they viewed as impermissible collateral attacks on permits.[315] In these cases, the courts' decisions were premised upon the notion that the EPA would assess the substantive validity or applicability of certain CAA requirements (including NSR requirements) [316] through the title V petition process, and that the EPA Administrator's decision in response to a title V petition could be challenged in Federal court. Based on that premise, these courts decided that the jurisdictional bar in CAA section 307(b)(2) against ''[a]ctions of the Administrator with respect to which review could have been obtained'' applies to bar enforcement of these the substantive requirements underlying those enforcement actions.[317] These decisions, however, did not identify statutory or regulatory text to support this premise; to the extent they involved NSR issues, they may have been implicitly based on EPA practice from 1997 to 2017.[318]

In light of the EPA's approach since 2017 with respect to certain NSR permits, the EPA believes that the premise underlying those cases no longer applies.[319] This rule codifies the EPA's view that certain NSR issues are not subject to review through title V processes, including the title V petition process. Because the EPA Administrator will not consider or take any action concerning the substantive validity of certain NSR permitting decisions through title V, there is no opportunity for Federal judicial review of such issues through title V. Therefore, one could argue that the statutory bar in CAA section 307(b)(2) does not apply in situations where the EPA Administrator would not consider the substantive validity of NSR permitting decisions through title V. In other words, enforcement of certain NSR-related requirements in the district court may no longer be viewed as a collateral attack on an Administrator's action (or lack thereof) through title V for which review could have been obtained in an appellate court. At least one court that considered this issue since the EPA revised the Agency's interpretation in 2017 has declined to impose such a jurisdictional bar.[320]

3. Impacts on the EPA

This action most directly affects the EPA itself, specifically the Agency's actions in overseeing both the title V and NSR permitting programs. This action will codify the EPA's current framework regarding the scope of issues that the Agency will—and will not—review through unique title V permitting mechanisms, including the Agency's 45-day review of title V permits and responses to citizen petitions challenging title V permits. Reflecting this existing approach more directly in regulations will provide consistency across the EPA's regions and ensure that the Agency's permitting oversight resources are most effectively focused on the issues for which such oversight can achieve the greatest results. For example, by not reviewing complex NSR issues through title V oversight tools, the EPA can prioritize using those tools to ensure that title V permits assure compliance with applicable requirements established in other CAA programs, such as by ensuring that title V permits include sufficient monitoring, recordkeeping, and reporting requirements. This action further emphasizes the EPA's commitment to using the Agency's existing title I oversight tools to address title I permitting issues, as appropriate. As discussed in section III.C.4.b of this preamble, those title I oversight tools are more effective in addressing title I issues than the EPA's title V oversight tools.

4. Impacts on State, Local, and Tribal Permitting Authorities

This rule may also impact State, local, and Tribal permitting authorities that issue title V and/or NSR permits. From the EPA's experience, most permitting authorities already implement their title V and NSR programs in a manner consistent with the Agency's approach. That is, these permitting authorities do not use the title V permitting process to reevaluate NSR permitting decisions that they themselves previously made. For permitting authorities that have not been implementing the EPA's current approach, this action is expected to decrease administrative burden. Permitting authorities should only have to address NSR-related permitting issues once: during the NSR permitting process.

Permitting authorities are not required to revise their regulations or submit revised part 70 regulations or SIP regulations for EPA approval as a result of this rule. The EPA views the existing part 70 and part 71 regulations—and, by extension, the equivalent regulations in EPA-approved State rules—to be consistent with the EPA's approach. This rule is intended to make EPA regulations clearer. Nonetheless, permitting authorities that desire the greater certainty associated with the rule revisions finalized in this action are welcome to make changes to their regulations similar to those the EPA is proposing.[321]

As discussed in section III.D.5.b of this preamble, this final rule does not itself mandate any requirements governing the procedures used to issue

[313] Specifically, if the EPA does not object to a title V permit on the Agency's own volition and subsequently denies a petition requesting that the Agency object to the permit, such denial may be appealed to the relevant U.S. Court of Appeals. 42 U.S.C. 7661d(b)(2), 7607(b)(1).

[314] *Citizens Against Ruining the Env't* v. *EPA,* 535 F.3d 670, 678 (7th Cir. 2008) (quoting 42 U.S.C. 7661c(f)).

[315] *See Nucor Steel-Arkansas* v. *Big River Steel, LLC,* 825 F.3d 444 (8th Cir. 2016); *EPA* v. *EME Homer City Generation, LP,* 727 F.3d 274 (3rd Cir. 2013); *Sierra Club* v. *Otter Tail Power Co.,* 615 F.3d 1008 (8th Cir. 2010); *Romoland School Dist.* v. *Inland Empire Energy Ctr., LLC,* 548 F.3d 738 (9th Cir. 2008).

[316] *See Nucor,* 825 F.3d at 452–53; *Romoland,* 548 F.3d at 754–56.

[317] 42 U.S.C. 7607(b)(2).

[318] One public commenter characterized some of these cases as holding that the CAA requires the EPA to review questions about major NSR applicability through the title V process. The EPA disagrees with that characterization of these court decisions. See section 3.6.1 of the RTC.

[319] The EPA's discussion in this preamble of these court decisions is limited to the context of this rulemaking and the relevance of these cases to the issues raised herein. This preamble is not intended to encompass the EPA's views on the merits of any other substantive aspects of these cases, including those courts' overall interpretations of how section 307(b)(2) functions in the context of title V permits.

[320] *See Sierra Club* v. *Entergy Arkansas LLC,* 503 F. Supp. 3d 821, 847–48 (E.D. Ark. 2020) (''In addition, plaintiffs maintain that the EPA's interpretation of statutory language such that it will no longer oversee state Title I permit decisions through Title V petitions provides an additional basis upon which the Court should decline to find and impose an exhaustion requirement. The Court has examined the allegations in the amended complaint and the briefing with respect to the specific provisions of the CAA under which plaintiffs bring claims and the alleged requirements for bringing those claims in federal court. The Court is satisfied at this stage of the litigation that the Court has subject matter jurisdiction over plaintiffs' claims in their amended complaint.'').

[321] For example, States within the Tenth Circuit's jurisdiction may currently have language that matches the language in the version of the EPA's regulation that the Tenth Circuit considered in *Sierra Club,* 964 F.3d 882 (10th Cir. 2020). Now that the EPA is revising the Agency's regulations, such States will have certainty that the Agency will not use the title V process to address NSR issues as to States within the Tenth Circuit.

NSR permits (such as public notice and the opportunity for comment and judicial review). The EPA intends to address the relevant statutory and regulatory requirements governing that issue in a separate action.[322] Nonetheless, as relevant to this action, it is possible that some permitting authorities may choose to change some of their NSR permitting practices to realize benefits in their permitting programs. For example, in order to ensure that the EPA will not use its title V oversight tools to revisit a permitting authority's NSR permitting decisions, it is possible that permitting authorities may decide to increase the amount of public participation opportunities offered on certain minor NSR permit actions. Some permitting authorities expressed concerns with the additional cost associated with this increased public participation. The EPA reiterates that this is a decision that each permitting authority may make for itself after considering the relevant costs and benefits of providing these opportunities. The EPA is neither requiring nor encouraging such practices within this action.

Permitting authorities that process NSR and title V permit actions through streamlined processes should consider the best way to achieve their administrative efficiency goals while maintaining the maximum amount of clarity regarding the distinctions between title I and title V permit actions. See section III.D.4 of this preamble for additional information about how the use of different streamlined permit issuance procedures generally does not impact the EPA's review of NSR issues through the Agency's title V authorities.

5. Impacts on Regulated Entities

This rule will have minimal to no impact on the substantive emission control requirements to which regulated entities are subject. In general, regulated entities should benefit from the approach described in this action, which increases certainty in final preconstruction permitting decisions and reduces burdens associated with second guessing requirements already established outside the title V process.

Similar to permitting authorities, some regulated entities expressed concern with additional costs and other impacts associated with the aspect of the EPA's approach involving the presence or absence of public notice and the opportunity for comment when NSR permits are issued.[323] As discussed in section III.D.5.b of this preamble, this final rule does not itself mandate any procedural requirements governing the issuance of NSR permits.

6. Impacts on the Public

The EPA expects that the public at large will benefit from the increased clarity provided in this rulemaking, as well as from more effective engagement in NSR permitting decisions. A central focus of this effort is to more clearly define the most appropriate and effective routes for the public to participate in—and, if necessary, challenge—different types of CAA permitting decisions. In this manner, this rule does not limit meaningful public participation but rather encourages more meaningful public participation by directing the public to the pathways that can be used to most effectively provide oversight over different types of permits.

As explained in section III.D.4.b of this preamble, the title V permitting process has generally been an ineffective mechanism to address deficiencies in NSR permitting actions. The available title I permitting and title III enforcement mechanisms are better tools for the public to utilize in addressing issues with NSR permitting decisions. The EPA's pre-2017 policies that ostensibly allowed interested parties to challenge NSR permit decisions through the title V process created a misleading incentive for such parties to forego those more appropriate and effective title I appeal mechanisms. As this rule makes clear, the interested public's attention and resources would be more effectively deployed in challenges to NSR permits through the appropriate title I permitting and title III enforcement channels.

In the limited circumstances in which the public lacks opportunities to address NSR permit deficiencies through the title I process, the title V permitting process serves as a backstop so that the public (and the EPA) have the ability to ensure that title V permits contain and assure compliance with the NSR-related requirements of the SIP.

The EPA received numerous comments from environmental and others interest groups, as well as members of the public, expressing concern that this rule would adversely affect air quality and public health, including in communities that are disproportionately impacted by pollution.[324] The EPA does not expect this rulemaking will materially affect air quality or public health. The title V program has never been a program for imposing substantive controls on air pollution. The EPA understands the commenters' perspective that in the past (pre-2017), the title V permitting process provided a mechanism for oversight of the NSR program, and in so doing ostensibly provided a vehicle for overseeing decisions that could affect air pollution and public health. But as explained above, that is not the purpose of the title V program.

IV. The General Duty Clause Concerning the Prevention of Accidental Releases of Hazardous Substances

A. Background and Summary of Final Action

On two occasions in recent years, the EPA received title V petitions requesting that individual title V permits include requirements designed to assure compliance with the ''General Duty Clause'' of CAA section 112(r)(1), which concerns the prevention of accidental releases of hazardous substances. These petitions were premised upon the suggestion that the General Duty Clause is an ''applicable requirement'' for title V purposes. However, as the EPA explained in the *Hazlehurst* and *Owens-Brockway Orders* denying both of these petitions, the General Duty Clause is not an applicable requirement for title V.[325] The basis for this position was fully explained in the EPA's *Hazlehurst* and *Owens-Brockway Orders,* as well as the January 2024 Proposed Rule.[326] Nonetheless, for the sake of transparency, the following section of this preamble restates and responds to significant public comments related to the EPA's rationale.

Although the current definition of ''applicable requirement'' in the EPA's part 70 and part 71 regulations may reasonably be read to exclude requirements of the General Duty Clause, the Agency is finalizing the regulatory amendments as proposed to provide further clarity.

This change is not expected to have any impacts on State permitting authorities, regulated entities, the public, or other stakeholders, as it simply clarifies an element of the title V program that has been understood and implemented in the same way since the

[322] *See* Minor New Source Review Program Air Permitting Public Participation Requirements for State Implementation Plans, 91 FR 41591 (July 7, 2026).

[323] See section 3.5.7 of the RTC.

[324] See section 3.6.2 of the RTC.

[325] *In the Matter of Owens-Brockway Glass Container Inc.,* Order on Petition No. X–2020–2 at 21–28 (May 10, 2021) (*Owens-Brockway Order*); *In the Matter of Hazlehurst Wood Pellets, LLC,* Order on Petition No. IV–2020–5 at 7–14 (December 31, 2020) (*Hazlehurst Order*).

[326] 89 FR 1150 at 1184–87 (January 9, 2024).

inception of the title V program in the early 1990s.

The majority of commenters on the January 2024 Proposed Rule, including comments from permitting authorities and regulated entities, supported the EPA's position on this topic.[327] Comments from environmental and other interest groups opposed the EPA's proposed approach.[328] The EPA's responses to those adverse comments are included either in the following subsections or in the RTC document available in the docket for this rulemaking.

B. Rationale for Final Action

1. Statutory Provisions

The General Duty Clause provides:

The owners and operators of stationary sources producing, processing, handling or storing [extremely hazardous] substances have a general duty in the same manner and to the same extent as section 654 of title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. *For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph*.[329]

The last sentence contains a key limitation of the General Duty Clause: citizen suits under CAA section 304 shall not be available to enforce the requirements of the General Duty Clause in the first instance; instead, this clause may only be enforced through action initiated by the EPA under CAA section 113.

This enforcement prohibition also effectively restricts the implementation of the General Duty Clause requirements through title V permitting. The CAA provides that all standards and limitations in title V permits are enforceable in the first instance through citizen suits initiated under section 304.[330] Thus, if the requirements of the General Duty Clause were included in title V permits, they would ostensibly be enforceable through enforcement of the title V permit itself. However, this would be in direct conflict with the unambiguous statutory prohibition on citizens initiating enforcement of the General Duty Clause under section 304.[331] To avoid this conflict and harmonize the language of the statute, the General Duty Clause must not be considered an ''applicable requirement'' that is implemented through title V permitting.

Public comments submitted by environmental and other interest groups argued that this statutory conflict related to enforcement could be resolved more narrowly without concluding that General Duty Clause requirements are not ''applicable requirements'' for title V purposes.[332] These commenters argued that if Congress had intended to prohibit General Duty Clause requirements from being included in title V permits, it could have expressly established such a prohibition. These commenters conclude that the statutory prohibition should be interpreted narrowly to only prohibit enforcement through the initiation of a citizen suit.

The EPA does not consider this to be the best reading of the statute when viewed as a whole.[333] The most plausible way to accommodate the commenters' narrower approach would be to include General Duty Clause requirements in title V permits and include a clause specifically exempting those terms from citizen enforcement. But this would not resolve the statutory conflict with CAA sections 304(a)(1) and (f)(4), which mandate that standards and limitations in title V permits are enforceable by citizens initiating an action. Instead, the best interpretation of the statute—including additional statutory provisions discussed in the following paragraphs, which commenters did not address—is that Congress did not intend for the General Duty Clause of CAA section 112(r)(1) to be enforced, and therefore implemented, through title V permits. The best way to effectuate the statute is for the EPA to clarify that such obligations are not ''applicable requirements'' for title V purposes.

Other text within the General Duty Clause further evinces congressional intent that the General Duty Clause would not be implemented through permitting. The statute indicates that the CAA section 112(r)(1) general duty shall be ''in the same manner and to the same extent as section 654 of title 29''—that is, the general duty clause within the Occupational Safety and Health Act (OSH Act). The OSH Act provision, enacted in 1970, is not implemented through site-specific permits, and citizen suits are not authorized to enforce it.[334] If Congress had intended the CAA General Duty Clause to be implemented in a fundamentally different manner than the OSH Act provision on which it was explicitly modeled—*e.g.,* through a permitting program that could be enforced by citizens in the first instance—it could have specifically said so. However, instead, Congress precluded citizen enforcement under the CAA General Duty Clause, and nowhere did Congress imply that it would be implemented through permitting.

Additionally, the CAA requires that States have the authority to enforce title V permits to receive EPA approval of their permitting programs.[335] The CAA General Duty Clause, however, is enforceable only by the Federal government. Because CAA section 304 is the only Federal authority through which citizens and State or local air agencies could enforce this type of CAA requirement, neither citizens nor State and local air agencies may enforce the General Duty Clause under the CAA. Because States cannot enforce this requirement, the EPA cannot delegate, and has not delegated, authority to implement or enforce the General Duty Clause to State or local air agencies.[336] If the requirements of the General Duty Clause were considered ''applicable requirements'' to be included within individual title V permits, States would be unable to enforce these new permit provisions, which would contradict CAA section 502(b)(5). This would mean that all State and local title V programs would be fundamentally

[327] See section 4.1 of the RTC.

[328] See section 4.2 of the RTC.

[329] 42 U.S.C. 7412(r)(1) (emphasis added).

[330] This is because any person may, under CAA section 304(a)(1), bring a suit ''against any person . . . who is alleged to have violated . . . or be in violation of (A) an emission standard or limitation under this chapter . . . .'' In turn, ''emission standard or limitation'' is defined to include, *inter alia,* ''any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter . . . .'' 42 U.S.C. 7604(f)(4); *see also* 40 CFR 70.6(b)(1); *see United States* v. *Gonzales,* 520 U.S. 1, 5 (1997). As discussed later, the EPA's regulations contain a limited exception to this principle, which is not applicable to the General Duty Clause.

[331] The specific prohibition on enforcement of the General Duty Clause by initiation of a citizen suit must govern over the general enforceability of title V permits. *See Nitro-Lift Technologies L.L.C.* v. *Howard,* 568 U.S. 17, 21 (2012).

[332] See section 4.2.1 of the RTC.

[333] *See Loper Bright Enters.* v. *Raimondo,* 603 U.S. 369 (2024).

[334] *See generally* 29 U.S.C. 651–78.

[335] 42 U.S.C. 7661a(b)(5); *see also* 40 CFR 70.4(b)(3).

[336] Additionally, some States are prohibited by State law from having general duty authorities. 58 FR 62262, 62278 (November 26, 1993). Certain commenters characterized the EPA's lack of delegation of CAA section 112(r)(1) requirements as mere ''inaction'' by the Agency. Such commenters misunderstood the EPA's discussion on this point in the January 2024 Proposed Rule and in prior rulemakings. The EPA cannot delegate CAA section 112(r)(1) to States. However, as explained elsewhere in this preamble, the EPA can and has delegated to States the authority to implement and enforce certain other portions of CAA section 112(r), namely the section 112(r)(7) risk management plan program.

flawed—an absurd result Congress could not have intended.

Notably, each of the relevant statutory provisions discussed earlier—the General Duty Clause of CAA section 112(r)(1), the relevant portion of CAA section 304 authorizing citizen suits to enforce title V permit terms in the first instance, and the entirety of title V—were promulgated in the same legislative package: the 1990 CAA Amendments. Accordingly, the tension between these provisions is best understood as reflecting an intentional choice by Congress to distinguish the General Duty Clause in CAA section 112(r)(1) from other CAA requirements that would be implemented through the title V permitting program.[337] For these reasons, the EPA rejects the request of public commenters to adopt an interpretation of the undefined statutory term ''applicable requirements'' that is ''expansive[ ] and without restriction'' with respect to the General Duty Clause in CAA section 112(r)(1).

2. Regulatory Provisions

Following the statutory text, the EPA's regulations provide: ''All terms and conditions in a part 70 permit . . . are enforceable by the Administrator and citizens under the Act.'' [338] Additionally, to be approvable by the EPA, State programs under part 70 must demonstrate authority to enforce permits.[339] Neither of these regulatory requirements are compatible with the view that the General Duty Clause, which is enforceable only by the EPA, should be included in title V permits.

The EPA must read the Agency's regulations in a manner consistent with the statute. As explained in the *Hazlehurst* and *Owens-Brockway Orders,* the existing definition of ''applicable requirement'' can reasonably be read to exclude the General Duty Clause of CAA section 112(r)(1).[340] Nonetheless, as noted by public commenters, the definition of ''applicable requirement'' could potentially be interpreted more expansively than the EPA intended. Thus, to provide maximum clarity to the public, the EPA is revising the definition of ''applicable requirement'' in 40 CFR 70.1 and 71.2 to make this more explicit.[341]

3. EPA Guidance and Implementation

Some adverse commenters alleged that the EPA's present approach is a ''recent and significant change of course by the agency'' that runs counter to ''longstanding practice by EPA.'' [342] The EPA disagrees. As explained in the January 2024 Proposed Rule, excluding the General Duty Clause from the regulatory definition of ''applicable requirement'' is consistent with how the EPA has described and implemented both the title V and CAA section 112(r) programs since their inception in the early 1990s. As commenters observed, several early EPA documents refer generally to CAA section 112(r) without specifying which precise portions of CAA section 112(r) would be implemented through title V.[343] From these general references, these commenters incorrectly inferred that CAA section 112(r)(1) would be among the provisions implemented by States through title V. On the contrary, the EPA's generic references to CAA section 112(r) were not intended to refer to CAA section 112(r)(1). In various rulemaking actions, the EPA has consistently indicated that the only applicable requirements related to CAA section 112(r) that need to be satisfied through title V are those related to CAA section 112(r)(7) risk management plans under 40 CFR part 68.[344]

The EPA made similar determinations in early title V petition orders. For example, in the 1997 *Shintech I Order,* the EPA concluded that ''compliance with the provisions of 40 CFR 68.215 . . . is sufficient to satisfy the legal obligations of section 112(r) for purposes of part 70.'' [345] The EPA therefore specifically rejected the petitioners' request for additional permit terms related to CAA section 112(r)(1), while noting the independent enforceability of the General Duty Clause.[346] Adverse commenters mistakenly characterized *Shintech I* as standing for the proposition that section 112(r)(1) obligations are applicable requirements for title V purposes that would need to be included in permits for sources that are not subject to part 68 requirements.[347] Rather, the *Shintech*

[337] *See Maracich* v. *Spears,* 570 U.S. 48, 65 (2013) (''It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.''); *see also Erlenbaugh* v. *United States,* 409 U.S. 239, 243–45 (1972) (''[*In pari materia*] is but a logical extension of the principle that individual sections of a single statute should be construed together . . . . [T]he rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time.''); *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.,* 484 U.S. 365, 371 (1988) (''A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'').

[338] 40 CFR 70.6(b)(1). This principle is subject to one exception: certain terms in a title V permit that are not based on the CAA may be labeled as ''State-only'' requirements that are not federally enforceable or enforceable by citizens through CAA section 304. 40 CFR 70.6(b)(2). The General Duty Clause, which is contained within the CAA, is not eligible for this treatment. Beyond this limited exception, neither the statute nor regulations contemplate other means by which the enforceability of title V permit terms could be restricted in a manner consistent with the limitations in the General Duty Clause discussed earlier.

[339] 40 CFR 70.4(b)(3)(vii).

[340] *See Hazlehurst Order* at 9–10; *Owens-Brockway Order* at 23–24.

[341] This regulatory amendment only affects the title V regulations in 40 CFR parts 70 and 71 because there are no corresponding regulations directly governing General Duty Clause obligations, as discussed further in section IV.B.4 of this preamble.

[342] See section 4.2.2 of the RTC.

[343] *See, e.g.,* 56 FR at 21761; Memorandum, *Relationship between the Part 70 Operating Permit Program and Section 112(r)* (June 24, 1994), available at *https://www.epa.gov/sites/production/files/2015-08/documents/opp112r.pdf.*

[344] *See, e.g.,* 57 FR at 32275–76; 60 FR 13526, 13526, 13535–36 (March 13, 1995); 61 FR 31668, 31688–89 (June 20, 1996). This rule does not affect the risk management plan program under CAA section 112(r)(7) or 40 CFR part 68 in any way. However, the limited intersection between CAA section 112(r)(7) risk management plans and title V permits provides context for the EPA's position on the CAA section 112(r)(1) General Duty Clause. The EPA has, through rulemaking, limited the extent to which even the CAA section 112(r)(7)-related ''applicable requirements'' would be implemented through title V. Specifically, when the EPA promulgated the final part 68 risk management plan rules in 1996, the Agency determined that ''generic terms in [title V] permits and certain minimal oversight activities'' would assure compliance with risk management plan requirements. 61 FR at 31689; *see also* 57 FR at 32275 (''The EPA recognizes, however, that an RMP is not in any sense a 'permit' to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V.'') (citing 42 U.S.C. 7412(r)(7)(F)). For sources subject to both part 68 and title V, these permit content and State oversight requirements are codified at 40 CFR 68.215. For additional information concerning the limited intersection between risk management plans and title V permits, *see In the Matter of Newark Bay,* Order on Petition No. II–2019–4 at 9–16 (August 16, 2019). Requiring title V permits to include permit terms related to the General Duty Clause that are even more specific than those the EPA has established for risk management plans would go well beyond the EPA's long-held view of the scope of CAA section 112(r)-related ''applicable requirements'' that would be implemented through title V.

[345] *In the Matter of Shintech Inc., PVC Plant,* Order on Petition at 12 (September 10, 1997).

[346] Specifically, the EPA emphasized that ''compliance with the requirements of part 68 does not relieve Shintech of its legal obligation to meet the general duty requirements of section 112(r)(1) of the Act . . . . Section 112(r)(1) remains a self-implementing requirement of the Act, and EPA expects and requires all covered sources to comply with the general duty provisions of 112(r)(1).'' *Shintech I Order* at 12 n.9. The EPA also explained that it would be improper to shield a source from liability under the General Duty Clause using a title V permit shield. *Id.*

[347] Sources subject to the risk management plan regulations under part 68 are stationary sources

Continued

I decision reflected the fact that part 68 requirements under section 112(r)(7) are the only requirements of section 112(r) that must be included in a title V permit. As explained in the January 2024 Proposed Rule, this is true regardless of whether a source is subject to risk management plan requirements under part 68. For example, in the 2001 *Pencor-Masada I Order,* the EPA applied similar principles to a source that was not subject to part 68. There, the EPA reiterated that a source's obligations under the General Duty Clause are unaffected by compliance with part 68 or the terms of a source's title V permit.[348] The EPA has made similar statements concerning title V and CAA section 112(r) in other guidance documents.[349]

Similar to the EPA's title V guidance, the Agency's longstanding guidance concerning the implementation of the General Duty Clause suggests that the General Duty Clause is not to be implemented through title V. Notably, in the EPA's comprehensive Guidance for Implementation of the General Duty Clause (''GDC Guidance''), the EPA details the mechanisms through which the General Duty Clause would be implemented and enforced, and never once mentions permitting as an available mechanism.[350]

In the January 2024 Proposed Rule, the EPA expressed the Agency's understanding that most permitting authorities implementing part 70 programs have historically followed the same view as the Agency. Adverse commenters identified two State permitting authorities that previously included generic General Duty Clause requirements in title V permits.[351] Commenters cited these examples to support their characterization of the EPA's rule as a departure from longstanding practice and one that removes important mechanisms to protect the public from accidental releases. The EPA disagrees. The fact that a minority of State programs may have erroneously included a generic permit term related to the General Duty Clause does not change the fact that, from the EPA's perspective, these requirements have never been considered ''applicable requirements'' that should be implemented through title V permitting.[352] This final rule simply codifies the EPA's long-held position.

4. Additional Policy Considerations

If the EPA were to consider the General Duty Clause an applicable requirement with which a title V permit must assure compliance, this change in position would have significant programmatic impacts, upsetting the administration of both the title V and General Duty Clause programs nationwide. For example, the EPA expects that many major sources subject to the title V program may, at some time or another, also have obligations under the General Duty Clause. If the General Duty Clause were considered an applicable requirement, thousands of title V permits nationwide would need to be reopened to include conditions necessary to identify and assure compliance with the clause.

Adverse commenters argued that the resource burden of implementing the General Duty Clause through title V would be manageable, based in part on the fact that two State air permitting agencies had previously included General Duty Clause-related requirements in title V permits.[353] As these commenters noted, one State permitting authority previously included a permit term indicating, in relevant part: ''if the Permittee produces, processes, handles, or stores any amount of a listed hazardous substance, the Permittee has a general duty to take such steps as are necessary to prevent the accidental release of such substance and to minimize the consequences of any release.'' But as commenters implicitly acknowledged, including this type of generic language serves little purpose.[354] Indeed, commenters did not argue that this type of generic language should be included in title V permits. Instead, commenters repeatedly advocated for title V permit terms that ''set[ ] out the specific and detailed conditions by which sources will comply'' with the General Duty Clause. As explained in the January 2024 Proposed Rule, it would be exceptionally burdensome for permitting authorities to establish such detailed requirements for thousands of facilities across the Nation. Such an enormous resource burden on the permitting authorities that implement the title V program would hardly make sense given that these same permitting authorities cannot enforce the General Duty Clause.[355] This is clearly not an outcome that either Congress or the EPA envisioned when establishing these two programs.

Other practical concerns—closely related to the legal issues discussed previously—weigh against implementing the General Duty Clause through title V. For example, there is no mechanism under the EPA's existing statutory and regulatory authorities to structure a title V permit containing General Duty Clause requirements in a way that avoids the statutory constraints on enforcement discussed earlier. All Federally enforceable permit terms must necessarily be enforceable by the State agencies issuing the permits as well as through the citizen-suit process.[356] Neither the CAA nor the EPA's regulations provide that certain portions of the title V permit can be labeled ''enforceable only by the EPA.'' Public commenters suggested that the EPA could use the rulemaking process to create an exception to this principle: a new class of permit terms that are considered Federally enforceable applicable requirements, but which are

where a specifically-identified regulated substance is present over a threshold quantity, as outlined in 40 CFR 68.130. However, the General Duty Clause is more expansive than the part 68 requirements in that stationary sources where any extremely hazardous substance is present must comply with the General Duty Clause. Therefore, there are some instances in which a source must comply with both part 68 and the General Duty Clause, and other instances in which a source is subject to the General Duty Clause alone.

[348] *See Pencor-Masada I Order* at 31–32 n.38.

[349] *See, e.g.,* U.S. Environmental Protection Agency. (1993). Memorandum, *Title V Program Approval Criteria for Section 112 Activities,* available at *https://www.epa.gov/sites/production/files/2015-08/documents/t5-112.pdf;* U.S. Environmental Protection Agency. (1994). Memorandum, *Relationship between the Part 70 Operating Permit Program and Section 112(r),* available at *https://www.epa.gov/sites/production/files/2015-08/documents/opp112r.pdf.*

[350] U.S. Environmental Protection Agency. (2000). *Guidance for Implementation of the General Duty Clause, Clean Air Act Section 112(r)(1),* EPA 550–B00–002, available at *https://www.epa.gov/sites/production/files/documents/gendutyclause-rpt.pdf.*

[351] See section 4.2.2 of the RTC.

[352] To date, the EPA has not received a petition requesting the Agency's objection to this erroneous practice, and the Agency's lack of any proactive objection to any title V permits containing General Duty Clause provisions does not indicate the EPA's endorsement of this practice. *See* Memorandum, Guidance on Streamlining Title V Operating Permit Reviews at 3 (May 11, 2026), available at *https://www.epa.gov/system/files/documents/2026-05/guidance-on-streamlining-title-v-operating-permit-reviews-5-11-26.pdf.*

[353] See section 4.2.2 of the RTC.

[354] By the same token, removing this type of generic permit condition—as the two States at issue have done since 2017—has similarly little impact. With or without those erroneously included permit terms, each facility's specific obligations must be assessed by the EPA outside of the permitting context. Thus, the EPA disagrees with commenters' suggestion that this rule, or States' decisions to remove such provisions from title V permits, makes those permits ''worse'' or less protective of the public.

[355] No statutory or regulatory mechanism currently exists for the EPA to establish General Duty Clause requirements for all title V sources nationwide. Even if it did, implementation of any such mechanism would present an even greater resource issue for the EPA and would run against Congress's intent that the title V program is to be primarily implemented by the States, not the Agency. *See* 42 U.S.C. 7661a; *see, e.g., Env't Integrity Project,* 969 F.3d at 536, 545.

[356] *See* 42 U.S.C. 7604(a)(1), (f)(4), 7661a(b)(5)(E), 7661c(c); 40 CFR 70.4(b)(3)(vii), 70.6(b)(1).

not enforceable by States or citizens.[357] Even assuming that the EPA possesses statutory authority to establish this unique class of title V permit terms, doing so would be unnecessary. The General Duty Clause under CAA section 112(r)(1) is the only type of requirement that could purportedly benefit from such a novel approach. A more straightforward and less novel solution, which reflects the best interpretation of the statute, congressional intent, and various policy considerations, is to exclude the General Duty Clause from implementation through title V permitting altogether. Indeed, the many novel questions and administrative steps that would be required to adopt such an approach to the General Duty Clause further suggests that Congress did not intend to encompass that provision within the statutory phrase ''applicable requirements'' without further discussion in the statute (and without debate).

The obligation that States retain sufficient authority to enforce title V permit terms, coupled with the inability of States to enforce the General Duty Clause, would create additional problems if the General Duty Clause were considered an ''applicable requirement.'' The EPA could face pressure to issue notices of deficiency to all 117 State, local, and Tribal permitting authorities nationwide for their failure to enforce all aspects of the title V program.[358] Moreover, the EPA could face pressure to take over the issuance of all title V permits, or to issue partial permits to nearly every title V source to cover these sources' General Duty Clause obligations.[359] These are clearly not reasonable propositions, as such outcomes would be contrary to congressional intent for the title V program to be primarily administered by States, but nonetheless ones that could inevitably follow if the EPA were to consider the General Duty Clause an ''applicable requirement'' for title V purposes.

In addition to these untenable impacts to title V permitting, determining that the General Duty Clause must be included in title V permits would fundamentally alter the EPA's implementation and enforcement of the General Duty Clause itself. The EPA has historically described the General Duty Clause as a ''self-executing requirement.'' [360] This means that the General Duty Clause is meant to be implemented and enforced independently as a direct requirement of the CAA, beyond any set of regulations or specific requirements detailed within individual title V permits.

Adverse commenters argued that title V permits, by their nature, can accommodate a balance between operational flexibility and the need for clear, enforceable permit requirements.[361] Commenters further argued that including specific, forward-looking permit terms reflecting each facility's General Duty Clause requirements would aid in the facility's understanding of risk management obligations and would aid the EPA's enforcement of these requirements. Commenters argued that this type of proactive approach is preferable to reactive enforcement only after serious incidents occur.

As a general matter, the EPA agrees that the title V permitting program offers benefits for identifying and assuring compliance with many types of more typical emission standard-based requirements under regulations promulgated under the CAA. For example, as discussed in section II.F of this preamble, title V permits can be used to identify more specific requirements necessary to assure compliance with generic requirements in a SIP. However, as the EPA explained in the January 2024 Proposed Rule, these functions of the title V program are a particularly poor fit for implementing General Duty Clause obligations because they were not designed to be specifically identified or constrained through permitting.

The General Duty Clause, as its name suggests, is intended to be a general duty. Identifying specific obligations within each source's title V permit would conflict with the notion of a general duty. Moreover, determining whether an individual source has satisfied this general duty is highly circumstance-specific. The EPA interprets the General Duty Clause to require owners and operators to adhere to recognized industry practices and standards in addition to any applicable government regulations.[362] However, there may be situations that make a particular industry standard or municipal code inapplicable, unsuitable, or insufficient for a given source, and there may be other ways to abate hazards than those listed in a particular industry standard or municipal code. Each source's obligations are dependent on the detailed knowledge of the individual source. Even in the absence of an industry standard, a source's knowledge of a potential hazard and a feasible means to abate it is relevant to its general duty under CAA section 112(r)(1).[363] Should a source learn of a hazard and a feasible means to abate it after its permit is written, the General Duty Clause would ordinarily hold the source responsible for its knowledge. Given that the factual circumstances and knowledge at the source, as well as any relevant industry guidelines, can change frequently, the source's obligations under the General Duty Clause are necessarily fluid. If General Duty Clause obligations were to be included in title V permits as applicable requirements, the relevant permit terms would need to be constantly updated to accurately reflect a source's obligations (inviting further scrutiny of the terms each time). Overall, identifying specific General Duty Clause requirements would not only curtail the flexibilities rightly available to a source, but it would also undermine the General Duty Clause by limiting the scope of a source's potential obligations to those specific requirements contained in the permit.[364]

For these reasons, the EPA has rejected requests to define and restrict General Duty Clause obligations through rulemaking.[365] It would be similarly

[357] See section 4.2.1 of the RTC.

[358] *See* 40 CFR 70.10(b), (c)(1), appx. A.

[359] *See* 40 CFR 70.10(b)(2)(iii); *see also* 40 CFR part 71.

[360] 61 FR 31668, 31680 (June 20, 1996). The EPA has also described the General Duty Clause as a ''self-enabling'' or ''self-implementing'' requirement. *See* Letter from Mathy Stanislaus, Assistant Administrator, EPA Office of Solid Waste and Emergency Response, to Hon. Mike Pompeo, U.S. House of Representatives (August 1, 2013)) (Stanislaus-Pompeo Letter); *Owens-Brockway Order* at 27; *Hazlehurst Order* at 12; *Pencor-Masada I Order* at 32 n.38; *Shintech I Order* at 12 n.9. As discussed in section II.E of this preamble, the EPA has also used the term ''self-implementing'' to refer to certain types of requirements in other CAA programs, including NSPS and NESHAP. The intent of this phrase is slightly different in the context of the General Duty Clause than in the context of NSPS and NESHAP. The requirements of the General Duty Clause flow directly from the statute and are implemented in the absence of implementing regulations. By contrast, emission standards like NSPS or NESHAP are generally ''self-implementing'' once regulations are promulgated. The similarity is that in both situations, the self-implementing requirements are enforceable regardless of whether they are reflected in a title V permit.

[361] See section 4.2.2 of the RTC.

[362] *See* GDC Guidance at 2, 11–12.

[363] *See* GDC Guidance at 12.

[364] Were the General Duty Clause treated as a permit term, a source could argue it was shielded from its duty by the terms of the permit for hazards identified after the permit was issued. The potential for sources to request a title V permit shield to cover General Duty Clause obligations would exacerbate these concerns, notwithstanding that such a permit shield would not be appropriate, as the EPA has previously explained. *See Shintech I Order* at 12 n.9.

[365] *E.g.,* Stanislaus-Pompeo Letter.

inappropriate to define and restrict these obligations through title V permit terms. Public commenters appear to have misunderstood the relevance of the EPA's decision not to promulgate regulations under CAA section 112(r)(1); they suggest that the Agency's ''own past regulatory inaction'' cannot be ''a reason to curtail the General Duty Clause's applicability.'' [366] This argument misses the point: the lack of regulations implementing the General Duty Clause was not due to ''regulatory inaction,'' but rather a conscious decision not to promulgate such regulations. Moreover, the same reasons underlying the EPA's past decisions not to define General Duty Clause obligations through rulemaking also support the Agency's position not to implement General Duty Clause obligations through individual title V permits. Neither of these decisions curtail the General Duty Clause's applicability.

In summary, the CAA specifically prohibits the General Duty Clause from being enforced through the citizen suit provision in section 304 that is available for all standards and limitations included in title V permits. The best interpretation of this statutory provision, among other relevant statutory provisions, is that Congress did not intend for the General Duty Clause to be considered an applicable requirement implemented through title V permitting. The EPA must draft and interpret the Agency's regulations consistent with the statute. Although the current part 70 and 71 regulations can be interpreted as consistent with this position, the EPA is amending the regulations to make this more explicit. This change is consistent with the EPA's implementation of both the title V and General Duty Clause programs since their inception in the early 1990s. Moreover, this amendment is consistent with sound policy and avoids nationwide programmatic impacts that would follow if the EPA attempted to implement the General Duty Clause through title V.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 14192: Unleashing Prosperity Through Deregulation

This action is considered an Executive Order 14192 deregulatory action. This final rule provides burden reduction by explicitly codifying the EPA's existing approach that limits opportunities for the public to challenge, and accordingly the need for regulated entities and permitting authorities to reevaluate, the substance of title I preconstruction permitting decisions during the title V permitting process. This action will reduce administrative costs of such duplicative reevaluations for regulated entities, permitting authorities, and the EPA. This rule also increases certainty in preconstruction permitting decisions, thereby reducing costs on regulatory entities associated with uncertainty. This rule will also allow the EPA to implement this approach within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, thereby extending the deregulatory benefits of the Agency's approach to regulated entities and permitting authorities in that jurisdiction.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0243 (for the Part 70 State operating permit programs) and 2060–0336 (for the Part 71 Federal operating permit program). The clarifications to the regulations finalized in this action do not directly change any of the information collection activities previously approved by OMB.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This final rule primarily concerns the EPA's exercise of the Agency's oversight obligations when reviewing title V permits issued by State, local, and Tribal permitting authorities, when reviewing title V petitions submitted by any person, and when issuing title V permits under 40 CFR part 71. This action does not directly impose any requirements on the entities involved in these processes (including permitting authorities, permittees, and members of the public). Although those entities could eventually be affected by case-by-case decisions made when the EPA exercises the Agency's oversight and/or permitting authorities, the economic impact of any such future decisions on any small entities is expected to be minimal and not adverse. For example, this final rule reduces uncertainty and costs for small entities that obtain both NSR and title V permits by clarifying the limited circumstances under which NSR permitting decisions could be subject to additional EPA scrutiny through the title V permitting process.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local, or Tribal governments, or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175. One Tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating permit program, and one Tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. This rulemaking does not require those entities to take any specific action, as described in section III.E.4 of this preamble. Thus, Executive Order 13175 does not apply to this action.

The EPA informally engaged with Tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. Specifically, prior to issuing the January 2024 Proposed Rule, the EPA conducted

[366] See section 4.2.2 of the RTC.

outreach with Tribal representatives through a call with the National Tribal Air Association. Further, the EPA offered to further discuss the regulation with the Southern Ute Indian Tribe and Navajo Nation. On December 14, 2023, the EPA offered formal consultation with the Southern Ute Indian Tribe and Navajo Nation. The EPA did not receive requests for consultation or any public comments from Tribal governments.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order.

Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

K. Congressional Review Act (CRA)

This action is subject to the Congressional Review Act (CRA), 5 U.S.C. 801–808, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action does not meet the criteria in 5 U.S.C. 804(2).

VI. Statutory Authority

The statutory authority for this action is provided by 42 U.S.C. 7401 *et. seq.* More specifically, CAA sections 502(b) and 502(d)(3) direct the Administrator of the EPA to promulgate regulations establishing minimum elements of State operating permit programs and give the Administrator the authority to establish a Federal operating permit program.[367] Additionally, the Administrator determines that this action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine.''[368]

VII. Judicial Review

CAA section 307(b)(1) governs judicial review of final actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) when the EPA action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, but ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.'' For locally or regionally applicable final actions that are based on a determination of nationwide scope or effect, the CAA reserves to the EPA complete discretion to decide whether to invoke the exception in (ii).

This final action is ''nationally applicable'' within the meaning of CAA section 307(b)(1). This final action revises both the regulatory requirements in 40 CFR part 70 that govern State, local, Tribal, and U.S. territorial operating permit programs nationwide and the regulatory requirements in 40 CFR part 71 that govern Federal operating permits nationwide.

Under CAA section 307(b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the **Federal Register**. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review.

CAA section 307(d)(7)(B) also provides a mechanism for the EPA to convene a proceeding for reconsideration ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, William Jefferson Clinton Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with an electronic copy to the person listed in **FOR FURTHER INFORMATION CONTACT**, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20004. The filing of a petition for reconsideration by the Administrator of this final action shall not postpone the effectiveness of this final action, affect the finality of this action for the purposes of judicial review, or extend the time within which a petition for judicial review must be filed. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Lee Zeldin,

Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR parts 70 and 71 as follows:

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 2. In § 70.2, amend the definition of ''Applicable requirement'' by revising paragraphs (1), (2), and (4) to read as follows:

§ 70.2 Definitions.

* * * * *

Applicable requirement * * *

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through

[367] 42 U.S.C. 7661a(b) & (d)(3).

[368] 42 U.S.C. 7607(d)(1)(V).

rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter, provided that where a preconstruction permit described in paragraph (2) of this definition is issued with public notice and the opportunity for comment and judicial review, the terms and conditions of such a permit establish and define, for purposes of this paragraph, the applicable requirements of the implementation plan that apply to the activities authorized by such a preconstruction permit;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D or section 110(a)(2)(C), of the Act;

* * * * *

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act, but not including any requirement under section 112(r)(1) of the Act;

* * * * *

■ 3. Amend § 70.8 by revising paragraph (c)(1) to read as follows:

§ 70.8 Permit review by EPA and affected States.

* * * * *

(c) * * *

(1) The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. As part of this determination, the Administrator will not evaluate whether applicable requirements, as defined in § 70.2, were correctly established. No permit for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information required under § 70.8(a)(1), including under § 70.8(a)(1)(i) or (ii) where applicable.

* * * * *

■ 4. Amend § 70.12 by revising paragraph (a)(2) to read as follows:

§ 70.12 Public petition requirements.

(a) * * *

(2) *Identification of petition claims.* Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under this part. Any claim that an applicable requirement, as defined in § 70.2, was incorrectly established will not present grounds for the Administrator's objection. Any arguments or claims the petitioner wishes the Administrator to consider in support of each issue raised must be contained within the body of the petition, or if reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. For each claim raised, the petition must identify the following:

(i) The specific grounds for an objection, citing to a specific permit term or condition where applicable.

(ii) The applicable requirement as defined in § 70.2, or requirement under this part, that is not met.

(iii) An explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under this part.

(iv) If the petition claims that the permitting authority did not provide for a public participation procedure required under § 70.7(h), the petition must identify specifically the required public participation procedure that was not provided.

(v) Identification of where the issue was raised with reasonable specificity during the public comment period provided for in § 70.7(h), citing to any relevant page numbers in the public comment submitted to the permitting authority and attaching this public comment to the petition. If the grounds for the objection were not raised with reasonable specificity during the public comment period, the petitioner must demonstrate that such grounds arose after that period, or that it was impracticable to raise such objections within that period, as required under § 70.8(d).

(vi) Unless the grounds for the objection arose after the public comment period or it was impracticable to raise the objection within that period such that the exception under § 70.8(d) applies, the petition must identify where the permitting authority responded to the public comment, including page number(s) in the publicly available written response to comment, and explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment. If the response to comment document does not address the public comment at all, the petition must state that.

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PART 71—FEDERAL OPERATING PERMIT PROGRAMS

■ 5. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 6. In § 71.2, amend the definition of ''Applicable requirement'' by revising paragraphs (1), (2), and (4) to read as follows:

§ 71.2 Definitions.

* * * * *

Applicable requirement * * *

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter, provided that where a preconstruction permit described in paragraph (2) of this definition is issued with public notice and the opportunity for comment and judicial review, the terms and conditions of such a permit establish and define, for purposes of this paragraph, the applicable requirements of the implementation plan that apply to the activities authorized by such a preconstruction permit;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D or section 110(a)(2)(C), of the Act;

* * * * *

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act, but not including any requirement under section 112(r)(1) of the Act;

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